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Constitutional Torts

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CONSTITUTIONAL TORTS

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In 1871, as part of a Civil Rights Act,[1] the Forty-Second Congress passed a statute that allowed civil damage actions to be brought against those "who, under color of state law," have deprived others of constitutional rights.[2] That statute, now codified as 42 U.S.C. § 1983, remained in relative obscurity for ninety years[3] until the 1961 decision of the Supreme Court in *Monroe v. Pape*.[4] In *Monroe*, the Court held that a plaintiff whose constitutional rights have been infringed by one acting under color of state law can bring a federal cause of action under section 1983 even where the state provides an adequate remedy through its common law of tort.

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1. An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes, 17 Stat. 13 (1871).

2. The statute also served other purposes. In its current version, 42 U.S.C.A. § 1983 (West Supp. 1979), the statute reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
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> . . .

Section 1983 is also a frequent basis for requests for declaratory and injunctive relief. *E.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Allee v. Medrano, 416 U.S. 802 (1974). This Paper is concerned only with requests for damage relief.

Section 1 of the 1871 Civil Rights Act provided a cause of action only for deprivation of constitutional rights, and this Paper addresses only constitutional claims. In the 1874 consolidation of the laws of the United States, the statute was modified to include the phrase "and laws," which has been interpreted to encompass claims based solely on violation of federal statutes. Maine v. Thiboutot, 100 S. Ct. 2502 (1980).

3. Soon after its passage, the statute's effectiveness was curbed by restrictive interpretations of the fourteenth amendment. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1876); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). When § 1983 was used, it was limited to cases challenging race discrimination or restrictions on voting rights. Then, in the late 1930s, it was the basis of a suit in equity seeking to restrain harassment of labor organizers. *See* Hague v. CIO, 307 U.S. 496 (1939). All of these cases challenged action taken pursuant to state statutes or local ordinances, and thus fell within the most restrictive interpretation of § 1983's reference to action "under color of" state law. *See Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1156-69 (1977) [hereinafter cited as *Developments*].

4. 365 U.S. 167 (1961).

In the 1960s, federal courts used the revived statutory action to articulate significant limitations on state actions that injure individual citizens. Since then, section 1983 has become the source of considerable litigation; the statute has been used to challenge state practices that range from police brutality[5] to maternity leave policies.[6] These actions, along with other statutory civil rights actions, have required an increasing share of the attention of the federal courts. Between 1961 and 1979, the number of federal filings under section 1983 (excluding suits by prisoners) increased from 296 to 13,168.[7] Civil rights petitions by state prisoners increased from 218 cases in 1966, to 11,195 in 1979.[8] In 1976, almost one out of every three "private" federal question suits filed in the federal courts was a civil rights action against a state or local official.[9]

This explosion of actions has become a subject of considerable comment and consternation.[10] Among those most concerned are many judges of the federal courts. During recent years federal judges have elaborated various doctrines that, in purpose or effect, discourage section 1983 litigants and dispose of specific cases: standing;[11] exhaustion;[12] immunities;[13] abstention;[14] interpretation of the

5. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part in* Monell v. Department of Social Servs., 436 U.S. 658 (1978); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

6. *See, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658 (1978).

7. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR 6 [hereinafter cited as 1979 ANNUAL REPORT]; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT OF THE DIRECTOR 194 [hereinafter cited as 1975 ANNUAL REPORT]. The number of suits stabilized in 1978 and 1979. 1979 ANNUAL REPORT, *supra*, at 6.

8. 1979 ANNUAL REPORT, *supra* note 7, at 61; 1975 ANNUAL REPORT, *supra* note 7, at 207.

9. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 149 (Supp. 1977).

Unfortunately, statistics are unavailable on the number of § 1983 cases, as distinguished from civil rights cases generally, that are filed annually in the federal courts. In practice, virtually all civil rights cases filed against states in federal court include a § 1983 claim.

10. The commentary is too extensive for exhaustive listing. Some sense of the range of the literature can be derived from the following sample: Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, and the Federal Case Load,* 1973 L. & SOC. ORD. 557; Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement,* 46 U. CIN. L. REV. 45 (1977); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections,* 60 VA. L. REV. 1 (1974); Nahmod, *Section 1983 and the "Background" of Tort Liability,* 50 IND. L.J. 5 (1974); Newman, *Suing the Lawbreakers: Proposals To Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct,* 87 YALE L.J. 447 (1978); Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965); Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official,* 49 S. CAL. L. REV. 1322 (1976); *Developments*, *supra* note 3; Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 HARV. L. REV. 1486 (1969).

11. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975).

12. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973); Plano v. Baker, 504 F.2d 595 (2d Cir. 1974); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969) (Friendly, J.), *cert. denied*, 400 U.S. 841 (1970). *See also* Preiser v. Rodriguez, 411 U.S. 475 (1973).

eleventh amendment;[15] res judicata;[16] as well as close construction of the statutory language,[17] of the scope of the constitutional rights,[18] and of the elements of a cause of action.[19] In suits for declaratory or injunctive relief, traditional equitable doctrines have been adapted to restrain federal court interference in state activities.[20] This doctrinal complexity has turned section 1983 litigation into an elaborate, and often unpredictable, game.[21] The resulting confusion has created the worst of all possible worlds: little, if any, decrease in section 1983 litigation,[22] but serious weakening of the statute as a means to vindicate federal rights.

The Court's dissatisfaction with constitutional tort actions has been apparent from the time of section 1983's resurgence in Justice Douglas's opinion in *Monroe*. There Justice Douglas originated the view that section 1983 provides a distinct remedy "supplementary" to any available state tort relief. At the same time, he drew on common-law principles to define the scope of liability under section 1983,[23] an approach that suggested that section 1983 damage relief will often exist in precisely those situations where a state tort remedy is available.[24] In the last decade the analysis adopted in *Monroe* has

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13. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976); Wood v. Strickland, 420 U.S. 308 (1975); Pierson v. Ray, 386 U.S. 547 (1967).

14. *See, e.g.*, Juidice v. Vail, 430 U.S. 327 (1977); Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969).

15. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974). *But see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

16. *See, e.g.*, American Mannex Corp. v. Rozands, 462 F.2d 688 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972); Lackawanna Police Benevolent Assn. v. Balen, 446 F.2d 52 (2d Cir. 1971) (per curiam).

17. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 187-92 (1961), *overruled in part in* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

18. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976); Paul v. Davis, 424 U.S. 693 (1976).

19. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980); Taken Alive v. Litzau, 551 F.2d 196 (8th Cir. 1977); Duncan v. Nelson, 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972).

20. The federalism problems created by civil rights litigation are raised most dramatically by suits in equity, which seek direct interference by federal judges in state activities, and much has been written about limitations on federal equitable relief. *See, e.g.*, Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977); Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193; Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535 (1970). In this Paper, I am concerned with the more subtle, and often more debilitating, conflict between federal and state interests that arises when a section 1983 plaintiff seeks damage relief.

21. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 377-81 (1976); Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37 (1971).

22. *See* text at notes 7-9 *supra*.

23. 365 U.S. at 187.

24. Justice Douglas also construed the federal statute to exclude suits against municipalities, often the only available source for substantial monetary recovery. 365 U.S. at 187-92.

raised problems unforeseen by Justice Douglas. One of the explanations used to support the Supreme Court's retrenchment on section 1983 claims has even been the redundancy of section 1983 actions and state tort law. It has been suggested that the mere possibility that a factual situation can give rise to a state claim as well as a section 1983 suit should be sufficient to support a dismissal of the federal action.[25]

The clearest expressions of the new hesitancy are found in Justice Rehnquist's opinion in *Paul v. Davis*[26] and Justice Powell's opinion in *Ingraham v. Wright*.[27] In both cases, the Court's concern with problems that might be generated by a dual system of remedies for personal wrongs significantly affected its interpretation of the Constitution.

Paul was an action for equitable and monetary relief brought by a man whose picture had been included in a police department flyer that named and portrayed "ACTIVE SHOPLIFTERS." The plaintiff had been arrested on a charge of shoplifting, but the charges against him were dismissed without a trial shortly after the circulation of the flyer. He claimed that the police action labeled him a criminal without benefit of trial, and consequently violated the Constitution's guarantee of procedural due process. Justice Rehnquist, for a five-justice majority, wrote that Paul's claim was simply one of injury to reputation, and did not implicate any interest protected by the Constitution. Paul's arguments, Justice Rehnquist said,

> would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "Constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law . . . ; *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law.[28]

According to the Court, Paul was asserting an "interest in reputation [which] is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damage actions."[29]

In *Ingraham v. Wright*, plaintiffs were junior high school students who had been paddled severely by school authorities. They claimed

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This holding was only recently overruled. *See* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

25. *See, e.g.*, Aldisert, *supra* note 10, at 573-74.

26. 424 U.S. 693 (1976).

27. 430 U.S. 651 (1977).

28. 424 U.S. at 701.

29. 424 U.S. at 712.

that the paddlings, which had been administered without notice and a hearing, violated their rights under the cruel and unusual punishment clause of the eighth amendment and the due process clause of the fourteenth amendment. The Supreme Court granted certiorari on the eighth amendment question and the procedural due process claim.[30] Writing for the same five Justices who had joined Justice Rehnquist in *Paul*, Justice Powell found "[t]raditional common law concepts" relevant to the discussion of both constitutional provisions.[31] Citing *Blackstone's Commentaries* and the *Restatement (Second) of Torts*, Justice Powell began his opinion with a description of the common-law privilege for reasonable corporal punishment. Then, he found the eighth amendment inapplicable to the punishment of persons who had not been convicted of crimes. In support of this conclusion, he stressed that a student "has little need for the protection" of the Constitution because public schools are open institutions, and the "safeguards" afforded by their open nature "are reinforced by the legal constraints of the common law."[32] Finally, Justice Powell conceded that a liberty interest protected by the due process clause was implicated by the paddling, but he found traditional common-law remedies[33] to be "fully adequate to afford due process."[34]

Ambivalence about the creation of a dual system of remedies has plagued section 1983 damage litigation since *Monroe*. As with many

30. The Court denied review of plaintiffs' substantive due process challenge to the infliction of severe corporal punishment. 430 U.S. at 659 n.12. *See* note 34 *infra*.

31. 430 U.S. at 659 (citing Powell v. Texas, 392 U.S. 514, 535 (1968) (plurality opinion)).

32. 430 U.S. at 670-71 & n.39 (citing Powell v. Texas, 392 U.S. 514, 547-48 (1968) (opinion of Black, J.)).

33. It may be difficult to ascertain whether a given common-law remedy is in fact available in a particular state. State law on the question may be sparse because the cause of action has not been accepted by the state courts, or because the occasion for acceptance has not arisen. Justice Powell relied on a state statutory prohibition that had been construed by the state Attorney General "as a statement of common law principle," and on the assertions of the parties and the conclusions of the lower federal courts. 430 US. at 677 n.45.

34. 430 U.S. at 672. *See* Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 431 (1977). *See also* Bonner v. Coughlin, 517 F.2d 1311, 1319-20 (7th Cir. 1975) (opinion by then-Judge Stevens), *revd. in part en banc*, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978). The Court in *Ingraham* did not decide whether there is "an independent federal cause of action [available] to vindicate substantive rights under the Due Process Clause." 430 U.S. at 679 n.47. By the Court's own reasoning, which defines constitutional "liberty" by reference to the common law, 430 U.S. at 659-63, federal substantive protection may well duplicate state common-law guarantees. In any case, the only situations that are likely to spur students or their parents to institute state litigation are those in which punishment is so excessive or disproportionate that it raises substantive due process questions. If this is the case, the lengthy procedural discussion in *Ingraham* may be of trivial practical importance. 430 U.S. at 689 n.5 (White, J., dissenting). The Fourth Circuit has acknowledged a substantive due process right to be free of severe disciplinary corporal punishment by public school officials. *See* Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

debates about federalism, the discussion has polarized. On the one hand, there are those who argue that civil rights litigation under section 1983 will so burden the federal courts as to destroy them, while simultaneously snatching from the state courts litigation that lies at the core of state expertise. Others see every restriction on constitutional tort actions as a victory for the forces of racism and reaction. Of course, neither view is correct. Consideration of states' interests need not be inconsistent with a strong civil rights statute. Indeed, fair attention to states' concerns may be essential if that statute is to endure as a vehicle for our nation's tradition of vindication of individual rights. But more precise thinking about the interplay between common law and constitutional tort is also essential if the statute is not to be sacrificed to the vague fear that the Court is being asked, in suits seeking damages for the deprivation of constitutional rights, to create "a font of tort law to be superimposed upon . . . the states."[35]

In this Article, I analyze the significance of the overlap between state tort law remedies and remedies under section 1983. I conclude that the dissatisfaction with section 1983 cannot fairly be attributed to the fact that it has been read to provide a remedy that "supplements" state law. I argue that most of the anxiety over constitutional damage actions under section 1983 can be understood — and resolved — only by focusing on two other questions. The first of these concerns the appropriate reach of the Constitution. Ambivalence about section 1983 reflects, in part, a fear that the federal Constitution is being extended inappropriately to resolve too many questions, rather than being husbanded for those situations where federal intervention is essential. This fear raises substantive questions about the interpretation of particular constitutional provisions — questions that are beyond the scope of this Article. I am concerned, rather, with the practical consequences of constitutional extension — consequences that arise from all constitutional tort suits. These consequences include a dramatic increase in the workload of the federal courts, and substantial encroachment on the authority of the states. Both problems — caseload and federal-state balance — are at issue in section 1983 equity actions, as well as damage actions.

The second important question raised by section 1983 damage actions concerns whether that form of relief is properly awarded for a constitutional deprivation. Damages, in contrast to injunctive relief, have often been accepted as presumptively appropriate in the section 1983 context, as elsewhere — and any uncertainty about the

35. Paul v. Davis, 424 U.S. 693, 701 (1976).

propriety of a damage award has been converted into questioning whether the cause of action itself should be allowed. But damages under section 1983 are often inappropriate even where it is clear that a constitutional deprivation has occurred. We should therefore avoid equating uncertainty about damages with uncertainty about section 1983. An award of equitable relief in cases where damages are unacceptable is often appropriate to deter future constitutional violations. Moreover, we can eliminate some, if not all, of the difficulties associated with damage awards by assessing damages that are necessary to compensate section 1983 plaintiffs against government entities rather than individual defendants.

Failure to recognize and differentiate between these two problems, both implicit in the fear that section 1983 will become "a font of tort law," is one reason why discussions of that statute have become so confused. Although either concern can be the basis of an argument that a request for damage relief under section 1983 should be denied, the two problems have vastly different implications where equitable relief is sought. If a judge believes that the Constitution is being asked to do too much, he should deny constitutional protection of any sort, and equitable, as well as damage, relief should be unavailable. But if a judge's discomfort centers on the propriety of damage relief, the request for damages may be denied while an action for injunctive relief may remain available.

I begin in Part I by describing the extent to which a dual remedial system exists; I also examine the justification for the overlap between constitutional and common law that does exist. I then explore, in a descriptive fashion, the two concerns described above: in Part II, the costs involved in extending constitutional protection; in Part III, the problems with damage relief. I conclude with suggestions for continuing clarification of these problems.

I am not propounding a "new" approach to section 1983. I am suggesting that discussion can be more precise — and more simple. Ambivalence about the scope of the Constitution and ambivalence about damages as a remedy should not lead us to question the importance of section 1983. A strong civil rights cause of action is essential if we are to continue our traditional dedication to individual liberties. We should not allow it to be diluted by arcane doctrinal disputes.

I. The Interplay Between Common Law and Section 1983

In this section I explore the concept of section 1983 as a "supplement" to traditional tort relief — a federal remedy that exists even

when an adequate tort remedy exists. After charting the origin of this concept in Justice Douglas's cryptic opinion in *Monroe v. Pape*, I discuss the role that borrowings from the common law have played in the development under section 1983 of remedies for all constitutional deprivations. The adoption of common-law principles to resolve issues that arise in constitutional tort litigation has meant that the federal remedy often closely parallels that available under state law. Finally, I describe the justification for retaining a federal remedy in situations where state law could provide damage relief.

A. *Monroe v. Pape*

In *Monroe v. Pape* Justice Douglas adopted the view that section 1983 damage suits are tort-like actions supplementary to the common-law remedies available in state courts. He began by describing the situation to which the 1871 Congress was responding when it passed the legislation now embodied in section 1983. As he described the context, Congress was addressing the state of anarchy that it perceived to exist in the post-bellum South.[36] The Ku Klux Klan and its supporters were engaged in murders, rapes, whippings, and lynchings, while local authorities were unable or unwilling to apply the proper corrective to these wrongs committed by private individuals against each other.[37] Justice Douglas laid out the "three main aims" of the 1871 Congress: (1) to "override certain [invidiously discriminatory] state laws"; (2) to provide "a remedy where state law was inadequate"; and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[38]

The language that sets out the "supplementary" role of the statutory cause of action comes later in the opinion. Justice Douglas said:

> Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.[39]

Read in light of the legislative history described in Justice Douglas's opinion, this statement is unremarkable. In that context, Doug-

36. 365 U.S. at 172-78.

37. CONG. GLOBE, 42d Cong., 1st Sess., 374 (1871).

38. 365 U.S. at 173-74.

39. 365 U.S. at 183.

las's words may simply indicate that the Court will presume a state remedy to be inadequate where there is reason to believe that the state will not offer actual relief. This interpretation would rest on the conclusion that Congress did not intend to require each plaintiff to go through the charade of applying for state relief in order to establish an inadequacy that is already apparent. This narrow reading of legislative intent would harmonize with Congress's perception of the state of justice in the South in 1871. As I will demonstrate later,[40] it may also justify supplementary relief in certain modern contexts, such as suits brought by prisoners against prison officials.

But, as applied to the facts of *Monroe*, the conclusion that section 1983 is "supplementary to the state remedy" means something quite different. A more expansive reading of Justice Douglas's language is required because the plaintiffs in *Monroe* did not base their claim on a failure to enforce existing state laws against private individuals who had engaged in acts of violence. Rather, the complaint alleged outrages committed by the Chicago police: that defendant officers, without a warrant, broke into plaintiffs' home in the early morning, rousted them from bed, and made them stand naked in the living room while the officers ransacked the house.[41] It has often, and correctly, been pointed out that none of the three aims listed by Justice Douglas address a case like that before the Court in *Monroe* — one where an adequate state tort remedy arguably exists.[42] In that context, Justice Douglas was holding that a federal cause of action for damages is available even in those cases where a state remedy may exist.

In a concurring opinion, Justice Harlan attempted a more explicit, and, as we shall see, a more fruitful, justification for the *Monroe* result. He began by speculating about the motives that might have inspired Congress to provide a supplementary federal remedy. Justice Harlan suggested that Congress may have thought "that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."[43] He elaborated in a footnote:

40. *See* text at notes 295-98 *infra*.

41. 365 U.S. at 169. There were also allegations that Mr. Monroe was detained and interrogated by the police for ten hours without a hearing before a magistrate or an opportunity to contact his attorney or family. *See* 365 U.S. at 169.

42. *See, e.g.*, Aldisert, *supra* note 10, at 565; Note, *supra* note 10, at 1489.

43. 365 U.S. at 196 (Harlan, J., concurring).

> There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. . . . It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.[44]

We will return to examine the merit of this rationale in subsection C below.

B. *Common-Law Reference in Section 1983 Doctrine*

Constitutional tort actions are not coextensive with actions under state tort law. Constitutional and common law often provide protections that seem to encompass very similar interests.[45] For example, a state may provide personal or property protection that parallels the fourth amendment's guarantee against unreasonable searches and seizures.[46] But certain constitutional interests, such as the right to equal treatment,[47] the right to vote,[48] or the right to procedural due process,[49] have no neat tort analogues.[50] Other constitutional rights, such as the right to choose to have an abortion or the right of free speech, are uniquely rights against government action.

The language of section 1983 imposes restrictions that make it clear that many situations that give rise to a claim under state tort law will not give rise to a federal claim.[51] At the minimum, section 1983 requires that the defendant's action have taken place "under color of" state law or custom,[52] and that the interest infringed be

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44. 365 U.S. at 196 n.5.

45. *See, e.g.*, Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979) (eighth amendment, and negligence in operation of jail).

46. *See, e.g.*, Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963) (fourth amendment claim of arrest and seizure without probable cause, and assault and battery). The scope of protection and the damages recoverable may differ. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971); Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring).

47. *See* Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring).

48. *See* 365 U.S. at 196 n.5.

49. *See* Carey v. Piphus, 435 U.S. 247, 258 (1978).

50. In addition, see Imbler v. Pachtman, 424 U.S. 409, 441 (1976) (White, J., concurring in judgment).

51. *See* Baker v. McCollan, 443 U.S. 137, 142, 144, 146 (1979); Estelle v. Gamble, 429 U.S. 97, 106 (1976); Paul v. Davis, 424 U.S. 693, 700 (1976). *But see, e.g.*, Stenger v. Belcher, 522 F.2d 438 (6th Cir. 1975), *cert. dismissed as improvidently granted*, 429 U.S. 118 (1976).

52. Adickes v. S.H. Kress & Co., 398 U.S. 144, 165 (1970); Rondelli v. County of Pima, 120 Ariz. App. 483, 586 P.2d 1295 (1978).

"secured by the Constitution of the United States."[53] Any "intentional and unpermitted contact[] with the plaintiff's person" will support a common-law action for battery,[54] and any "apprehension of a harmful or offensive contact" will give rise to an action in assault,[55] but trivial interferences with a person or his property normally are not prohibited by the Constitution.[56] Indeed, "[t]he interests protected by state laws . . . , and those protected by the [Constitution] may be inconsistent or even hostile."[57]

Despite these differences, the courts' reliance upon common-law doctrine to resolve unsettled questions that arise in constitutional tort litigation has furthered the overlap begun in *Monroe* between section 1983 damage actions and actions under state tort law. In three respects the federal courts have deliberately drawn upon state tort doctrine to define the details of section 1983 actions. First, the courts have turned to state tort law for certain secondary rules, specifically those governing limitations, survival, and immunities. Second, the courts have adopted tort principles to define the elements necessary to establish a section 1983 plaintiff's case. Finally, in cases arising under the due process clause, the courts have used state tort law as a referent in defining the scope of constitutional interests.

The first of these adoptions from state tort law has been sanctioned by federal legislation. Congress has specifically provided, in 42 U.S.C. § 1988, that a court hearing a Civil Rights Act claim shall apply the law of the state in which that court sits when federal law is "deficient."[58] Thus, in ruling on section 1983 claims, the federal

53. *See* Martinez v. California, 444 U.S. 277, 284 (1980); Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring); Screws v. United States, 325 U.S. 91, 109 (1945), *quoted with approval in* Paul v. Davis, 424 U.S. 693, 700 (1976).

54. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 9 (4th ed. 1971).

55. *Id.* at § 10.

56. *See, e.g.*, Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.) (Friendly, J.), *cert. denied*, 414 U.S. 1033 (1973); Daly v. Pedersen, 278 F. Supp. 88, 94 (D. Minn. 1967).

57. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971). In addition, see New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

58. The meaning of "deficient" is not entirely clear. *See* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 508-15 (1980). Eisenberg argues that § 1988 was not intended to apply in § 1983 actions. His principal thesis is that § 1988 can be sensibly interpreted only if it is applied solely to actions that are removed from state to federal courts under 28 U.S.C. § 1443 (1976), the civil rights removal provision. *See id.*, at 500, 525-32.

Section 1988 provides in part:

> The jurisdiction in civil matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State

courts follow the statutes of limitations[59] and the survival rules[60] of the states in which they sit.

The federal courts have not always limited their search for secondary rules to the law of a particular state; at times, they appeal to general common-law principles. The rationale then rests not on the mandate of section 1983, but on the proposition that the legislators who enacted section 1983 were schooled in the principles of the common law and thus were likely to have intended that some of those principles be applied to actions under section 1983. The most obvious example of this process of adoption is found in the cases defining the immunities available to section 1983 defendants. In *Pierson v. Ray*,[61] the Court relied on *Monroe*'s reference to "the background of tort liability" (against which section 1983 should be interpreted[62]) to extend common-law defenses of good faith and probable cause to Jackson, Mississippi, police officers sued under the statute for allegedly unconstitutional arrests.[63] For authority, the Court referred to general common-law sources, including the *Restatement (Second) of Torts*, Harper and James's treatise, *The Law of Torts*, and a federal diversity case applying Missouri law in an action for false arrest.[64]

The Court in *Pierson* also held that the state judge who had found petitioners guilty enjoyed an absolute immunity for acts committed within his jurisdiction.[65] Again, the Court referred to general common-law principles. This time the Court relied on an earlier section 1983 damage action against a legislator[66] in which the holding had been based on "political principles already firmly established" in England and the colonies and embodied in the speech and debate clause.[67] The Court also relied on an earlier damage action against a

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wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

42 U.S.C. § 1988 (1976).

59. O'Sullivan v. Felix, 233 U.S. 318, 323-25 (1914); Almond v. Kent, 459 F.2d 200, 203 (4th Cir. 1972); Rondelli v. County of Pima, 120 Ariz. App. 483, 586 P.2d 1295, 1297 (1978). Section 1988 has also been interpreted to require federal courts hearing § 1983 actions to apply state tolling rules. *See* Board of Regents v. Tomanio, 100 S. Ct. 1790, 1794-96 (1980).

60. *See* Robertson v. Wegmann, 436 U.S. 584, 594-95 (1978).

61. 386 U.S. 547, 555-57 (1967).

62. 365 U.S. at 187.

63. The courts have also adopted the common-law defense of self-defense. Burton v. Waller, 502 F.2d 1261 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

64. 386 U.S. at 555 (citing Ward v. Fidelity & Deposit Co., 179 F.2d 327 (8th Cir. 1950); RESTATEMENT (SECOND) OF TORTS § 121 (1965); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 3.18, at 277-78 (1956)).

65. 386 U.S. at 553-55. *Accord*, Stump v. Sparkman, 435 U.S. 349, 355-57 (1978).

66. 386 U.S. at 553-55 (citing Tenney v. Brandhove, 341 U.S. 367 (1951)).

67. Tenney v. Brandhove, 341 U.S. 367, 372-75 (1951) (citing U.S. CONST. art. I, § 6, cl. 1).

District of Columbia judge in which the Court had rested its finding of immunity on the doctrine's "deep root in the common law."[68] In *Pierson* the Court emphasized that the "legislative record [of section 1983] gives no clear indication that Congress meant to abolish wholesale all common-law immunities."[69]

The Court has acknowledged, however, that common-law traditions must be rejected where they conflict with the goals of the civil rights statute. The Court first made this clear in *Scheuer v. Rhodes*,[70] when it again examined the scope of common-law immunity, this time that of executive officials. The Court recognized that the 1871 Congress could not have intended courts to adopt all common-law immunity principles: "[G]overnment officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under [the statute's] terms."[71] Similarly, in *Imbler v. Pachtman*,[72] Justice Powell surveyed the general common-law rules concerning a prosecutor's immunity from suit,[73] and did not consider his task concluded until he determined that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under section 1983."[74] In some more recent immunity decisions, such as *Procunier v. Navarette*,[75] the Court has not referred to common-law immunities at all.[76]

The second group of questions for which courts have turned to the common law for guidance concern the elements of a plaintiff's case under section 1983. Here I refer to questions regarding, among other things, causation, compensable injury, and the defendant's

68. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872).

69. 386 U.S. at 554.

70. 416 U.S. 232 (1974).

71. 416 U.S. at 243. Section 1983 was, after all, designed to redress wrongs that included the failure of state judges to enforce the laws impartially. *See* CONG. GLOBE, 42d Cong., 1st Sess., 394, 429 (1871) (quoted by Justice Douglas in Pierson v. Ray, 386 U.S. 547, 559-60 (1967) (Douglas, J., dissenting)). Thus, the statute was clearly intended to reach some officials who had received immunity from the common law.

72. 424 U.S. 409 (1976).

73. *See* 424 U.S. at 421-24. Justice Powell began his discussion with a reference to § 1983 as "creat[ing] *a species of tort liability* that on its face admits of no immunities." 424 U.S. at 417 (emphasis added).

74. 424 U.S. at 424. Justice Powell, for the Court, did decide to adopt the common-law immunity, but his approach makes it clear that unusual laws found in particular states are irrelevant to the federal question, and that even generally accepted common-law approaches will be rejected if they do not accord with federal policy.

75. 434 U.S. 555 (1978).

76. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975). *But see* Owen v. City of Independence, 445 U.S. 622, 638-50 (1980) (contains an extensive discussion of the common law on the question of municipal immunity); Bertot v. School Dist. No. 1, 613 F.2d 245, 248-49 (10th Cir. 1979) (en banc).

state of mind. To the extent that the elements of the state and federal causes of action are made to overlap, the redundancy of the federal compensatory scheme increases.

In adopting common-law principles to define the elements of a section 1983 case, the courts have seldom relied expressly on section 1988.[77] Rather, this use of common law seems to occur simply because section 1983 is unclear about the basis of the liability that it imposes. The statute does not create any substantive rights: it merely creates a cause of action for damages.[78] But this assumes that there is some way of deciding when an individual is responsible for the deprivation of constitutional rights, and when he is not.[79] Thus, it is not surprising that judges who are required to define this responsibility fall back on the concepts of personal obligation developed over the centuries in common-law actions for damages.

The Supreme Court first expressly used the common law to help define the elements of a plaintiff's case under section 1983 in the *Monroe* case. There, the Court had to decide what state of mind on the part of the defendant the plaintiff would have to prove to establish his case.[80] The Court rejected an argument that would limit liability to cases in which the plaintiff could comply with the criminal law requirement that "specific intent" be proved. Justice Douglas opted instead for the tort rule, which he described, rather obscurely,[81] as liability "for the natural consequences of [a defendant's] actions."[82] Of course, some constitutional rights are not violated unless the acting government official or body possesses a certain state of

77. *But see* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (a case under 42 U.S.C. § 1982); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

78. *See, e.g.*, Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

79. *See* text at notes 254-75 *infra*.

80. The statute by its terms premises responsibility only on "subjecting" another to the deprivation of a right. *See* note 2 *supra*.

81. The Court's language left open (indeed, created) the question whether unreasonable conduct that would be sufficient for negligence liability under the common law would also suffice for a § 1983 action.

82. 365 U.S. at 187. In addition, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 232-33 (1970) (Brennan, J., concurring), where Justice Brennan rejects the criminal standard of specific intent. Justice Brennan argues that the common law should be used to define the meaning of "custom, or usage" as it is used in § 1983. *See* 398 U.S. at 224-25.

At least one court, *see* Whirl v. Kern, 407 F.2d 781, 787-88 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969), has interpreted *Monroe* to allow recovery for purely negligent acts where state tort law premises liability on negligence in analogous situations. On other occasions the courts have held that the proper analogy in a particular case is to intentional tort, and have thus found negligence to be insufficient. *See* Madison v. Manter, 441 F.2d 537, 538 (1st Cir. 1971) (application for warrant); Nesmith v. Alford, 318 F.2d 110, 125-26 (5th Cir. 1963) (analogy to false imprisonment and malicious prosecution).

mind;[83] in these cases there is no need to refer by analogy to the common law. But in other cases, the courts have followed the lead of the Supreme Court in *Monroe*, referring to tort law for requirements concerning the defendant's state of mind.[84]

The most natural use of common-law concepts to define the elements of a section 1983 plaintiff's case has come, as Justice Harlan once suggested in another context, in framing principles "concerning causation and magnitude of injury necessary to accord meaningful compensation."[85] This use of the common law is most evident in the Supreme Court's decision in *Carey v. Piphus*,[86] a section 1983 action brought by children who alleged that their suspension from school contravened the procedural requirements of the Constitution. In *Carey*, the Court found it appropriate to deny presumed damages, at least where the right claimed is based on procedural due process.[87] To recover substantial nonpunitive damages, a plaintiff would be required to prove that he suffered injuries that were "caused by the deprivation of a constitutional right."[88] In imposing this require-

83. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976).

84. *See generally* Kirkpatrick, *supra* note 10.

85. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring). In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977), Justice Powell introduced a qualification to the principle that action motivated by racial discrimination violates the Equal Protection Clause: He indicated that a defendant who had been motivated by racial animus could still escape liability by "establishing that the same decision would have resulted even had the impermissible purpose not been considered." *See also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (a first amendment case). This qualification is reminiscent of the common law's requirement that "but for" causation be shown, *see* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 320 n.54 (1978) (Powell, J.), but under the common law causation is something that the plaintiff must establish as part of his prima-facie case. *But see* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).

In a recent case, Martinez v. California, 444 U.S. 277, 285 (1980), the Supreme Court held that a federal plaintiff also must establish that his injury is not "too remote a consequence" of the challenged government action.

86. 435 U.S. 247 (1978).

87. For an argument that this limitation is inappropriate in first amendment cases, see S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION 100 (1979), and Bryant v. McGinnis, 463 F. Supp. 373 (W.D.N.Y. 1978). The Seventh Circuit, in Konczak v. Tyrrell, 603 F.2d 13 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 668 (1980), and the Fourth Circuit, in Burt v. Abel, 585 F.2d 613 (4th Cir. 1978), have interpreted *Carey* to apply only to procedural due process cases.

88. 435 U.S. at 258. *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977).

I suggest below that traditional causation requirements are inappropriate when injunctive or declaratory relief is requested. *See* text at notes 276-77 *infra*. *Cf.* Fiss, *The Supreme Court, 1978 Term — Foreword: The Form of Justice*, 93 HARV. L. REV. 1, 47 (1979) ("violation" should not be viewed as discrete incident of wrongdoing, but as threat posed to constitutional values). In addition to adopting a strict view of causation from the common law, the Court, in one case, has applied a causation standard that may go even further than the common law in limiting liability. *See* Martinez v. California, 444 U.S. 277, 284-85 (1980).

ment and in defining the consequent burden on the plaintiff, the Court once more relied on common-law tort treatises.[89] The Court pointed out that the basic purposes of damage relief "hardly could have been foreign to the many lawyers in Congress in 1871."[90] However, as in *Scheuer* and *Imbler*, the common-law rules were only an "appropriate starting point" for section 1983 interpretation.[91]

The common law has played a third major role in defining the details of section 1983 actions through its use in constitutional interpretation. On occasion, primarily in due process cases, a court or commentator will refer to the common law in defining a federal constitutional right.[92] For example, Professor Monaghan argues that the "liberty" interest referred to in the due process clause derives from rights "protected by the common law from private interference."[93] In *Paul v. Davis* Justice Rehnquist defines certain "liberty" and "property" interests protected by procedural due process as having "attained this constitutional status by virtue of the fact that they have been initially recognized and protected by state law," including state common law.[94] Judicial reliance on the common law to flesh out the cause of action granted by section 1983 is understandable. Even in the best of circumstances, Congress cannot realistically be expected to "specify in advance all the possible circumstances to which a remedial statute might apply."[95] Moreover, section 1983 is cast in unusually vague and all-encompassing language, and the legislative history offers virtually no discussion that can be used to provide working details for the cause of action provided by the statute.[96] In addition, during the years in which section 1983 lay dormant, the

89. 435 U.S. at 255-56 nn.7 & 9. Lower courts had decided this question by looking to the law of a particular state. *See, e.g.*, Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971).

90. 435 U.S. at 255.

91. 435 U.S. at 258. The Court refused to presume that general damages had been incurred, and thus rejected an analogy to certain common-law torts (such as those designed to protect reputational and privacy interests), in which general damages are presumed. *See* Yudof, *supra* note 10, at 1371-74; Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979).

92. My colleague, Donald Regan, suggests, and persuasively illustrates, that discussion of the common law can play a role in evaluating claims brought under the equal protection clause. Professor Regan demonstrates that the common law provides the legal tradition against which the reasonableness of a legislative classification must be evaluated. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1618-29 (1979).

93. Monaghan, *supra* note 34, at 414.

94. 424 U.S. 693, 710 (1976).

The scope of the property or liberty interest may then be defined in terms of its protection under the common law. *See* Martinez v. California, 444 U.S. 277, 282 & n.5 (1980).

95. Pierson v. Ray, 386 U.S. 547, 560 (1967) (Douglas, J., dissenting).

96. *See* Monell v. Department of Social Servs., 436 U.S. 658, 665 (1978); Stefanelli v. Minard, 342 U.S. 117, 121 (1951).

problems of the nation, and the sphere of rights protected by the federal Constitution, changed dramatically.[97] When the statute was revived, it was called upon to perform a very different role — one that could not have been foreseen precisely, if at all, by the legislators that had passed the Civil Rights Act.

Of course, as Justice Harlan suggests,[98] the common law can offer only limited guidance by analogy. Where the common law is at odds with the purpose of section 1983, common-law doctrine should be ignored. Nor should borrowings from state tort doctrine become embedded. The divisions of responsibility between nation and state — and the respective needs of nation and state for strength and support — may shift, as it has in the last century. For example, new federal rights that protect individuals or states may develop more rapidly than state tort interests.

C. *The Need for a "Supplementary" Remedy*

When the plaintiff asserts an injury for which relief is available under state law — the only situation in which section 1983 relief is truly "supplementary" — the federal cause of action cannot be justified by the need for compensation or deterrence. The section 1983 action, as it has been interpreted, offers essentially the same recovery as that available at common law. In *Carey v. Piphus* the Supreme Court emphasized that "the tort rules of damages [may be appropriately applied] directly to [a] § 1983 action" where "the interests protected by a particular branch of the common law of torts . . . parallel closely the interests protected by a particular constitutional right."[99] In other cases, common-law rules of damages provide "the appropriate starting point" for calculation of damages.[100] And the Court also said, "there is no evidence that [Congress] meant to establish a deterrent more formidable than that inherent in the award of compensatory damages [at least where there is no showing of malicious intent on the part of the defendant]."[101] Indeed, where a section 1983 plaintiff has an "adequate" state tort action that remedy will, by definition, satisfy compensation and deterrence goals.

97. The most significant development, given the origin and purpose of § 1983, was the application of numerous guarantees of the Bill of Rights to the states by incorporation in the fourteenth amendment. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 457-501 (10th ed. 1980). The consequence of incorporation was to require that these rights be respected by state actors — and thus to bring them within the reach of § 1983.

98. *See* text at notes 102-04 *infra*.

99. 435 U.S. 247, 258 (1978).

100. 435 U.S. at 258.

101. 435 U.S. at 256-57.

Justice Harlan, in his concurrence in *Monroe*, suggests the proper justification for providing a "supplementary" remedy under section 1983. The explanation that his discussion implies is very simple: A federal remedy is provided because the interest asserted by the plaintiff is important enough to be protected by the federal Constitution.[102] State tort law may also be implicated, but the distinctively federal nature of the interest asserted by the plaintiff calls for a separate, and fully protective, federal remedy.[103] As Justice Harlan reminds us, when the state remedy is "fully appropriate to redress those injuries . . . against which the Constitution provides protection" it is a matter of "the purest coincidence."[104]

Where state tort relief is "adequate" in that its limitations do not go beyond those imposed by federal law, the significance of section 1983 to the plaintiff seeking damages is that, in conjunction with jurisdictional statutes,[105] section 1983 allows him access to the federal courts.[106] Much of the debate over the justification for "supplementary" federal relief has therefore focused on the propriety of withdrawing these cases, at the option of the plaintiff, from the state to

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102. *See* 365 U.S. at 196. When a federal remedy is available, the federal government, through its judges, is able to participate in the process of defining and articulating these core values. *See* Fiss, *supra* note 88.

103. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394-95 (1971). *Cf.* Great Am. Fed. Sav. & Loan Assn. v. Novotny, 442 U.S. 366, 377-78 (1979) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974)) (employee allegedly discriminated against by employer may seek to enforce both contractual rights and title VII rights in separate forums). *See also* Katz, *The Jurisprudence of Remedies: Constitutional Legalities and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 16 (1968).

This does not mean that "double recovery" is available when relief under both federal and state law is limited to actual damages. *See* Clappier v. Flynn, 605 F.2d 519, 529-31 (10th Cir. 1979).

104. 365 U.S. at 196 n.5.

A major practical advantage in proceeding under § 1983 is the possibility of recovering attorney's fees under the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988 (1976). In addition, punitive damages may be more freely available. *See* text at note 243 *infra*.

105. The jurisdictional counterpart of § 1983 is now codified as 28 U.S.C. § 1343(3) (1976). Like § 1983, this statute was originally part of § 1 of the Civil Rights Act of 1871, 17 Stat. 13 (1871). It provides that federal district courts shall have original jurisdiction, without regard to the amount in controversy, over civil actions brought "[t]o redress the deprivation, under color of any State law . . ." of any constitutional right, and of any right "secured . . . by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." *See* Lynch v.Household Fin. Corp., 405 U.S. 538 (1972).

106. Senator Thurman, an opponent of § 1983, described the Act at the time it was passed:

> [This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it — a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy.

CONG. GLOBE, 42d Cong., 1st Sess., at app. 216-17 (1871), 216-27, *quoted in* Owen v. City of Independence, 445 U.S. 622, 636 n.17 (1980).

the federal courts. The primary (and, I think, sufficient) justification for federal jurisdiction parallels the argument made above for a "supplementary" cause of action: Federal courts are the most appropriate place for redress of federal rights.[107] An open federal door symbolizes the importance of those rights.

But we need not be content with a justification based on symbolism. There are other reasons for providing a federal forum to resolve section 1983 claims. Congress may have concluded that cases raising questions of constitutional significance deserve the attention of a court of special jurisdiction. The limited caseload of the federal courts — a caseload of which section 1983 cases form a significant part — allows federal judges to develop expertise. In addition, civil rights litigation consumes time and money, costs that are most appropriately placed on the federal government. Since the federal government has imposed the obligations at issue in section 1983 litigation, that government should help bear the cost of their enforcement.

Other arguments support the provision of a federal forum.[108] Although state courts are constitutionally required to lend a sympathetic ear to federal interests, the perception of plaintiffs who assert federal interests that they have much to gain from access to federal courts has persisted for over a century.[109] Institutional explanations lend credence to the view that the federal bench is of higher quality[110] or more sympathetic to federal claims[111] than the state benches. When a plaintiff seeks damages from a state official, there is an additional concern that a state court will be protective of the defendant.[112] The state judge, relatively low paid himself,[113] may sympathize with the plight of another local official who is threatened

107. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 90 (1973).

108. Of course, there are additional reasons why a particular plaintiff might perceive a state forum as less desirable than a federal forum. For example, the composition of a state jury may differ in significant respects from that of a federal jury; the plaintiff's attorney may be more familiar with the rules of procedure in federal court than in a particular state court; and there may be important differences between the two jurisdictions in discovery or the admissibility of hearsay evidence.

109. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106-15 (1977).

110. *Id.* at 1121-24.

111. *See id.* at 1124-28.

112. Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1358 (1970). A similar sort of fear has been used for years to justify the diversity jurisdiction of the federal courts. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). However, there is increasing skepticism that state judges and juries in fact prefer in-state litigants over foreign opponents. *See, e.g.*, H. FRIENDLY, *supra* note 107, at 147-48.

113. *See* Neuborne, *supra* note 109, at 1121 & n.61.

with financial liability under section 1983 for an act committed while doing his job.[114]

In the final analysis, the function of a "supplementary" federal cause of action under section 1983, and of allowing plaintiffs to pursue such an action in federal court, is largely symbolic. But symbolism is important in our federal system, where the lines between nation and state are significant but difficult to define. Even where state relief exists it makes a great deal of sense to provide a federal cause of action, and federal jurisdiction, in order to affirm those rights that the federal government believes to be of special importance.

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114. Arguments focusing on the greater ability and lesser bias of federal judges as compared with state judges carry less force today than in earlier times. Not long ago the Supreme Court was willing to accept a litigant's distrust of the ability of state courts to dispose of federal claims in a wise and sympathetic fashion. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 242 (1972). But the Court has become unwilling to countenance such fears. *See, e.g.*, Allen v. McCurry, 101 S. Ct. 411, 420 (1980); Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976). Indeed, one federal judge has described the choice of a federal forum as simply reflecting a "Pavlovian" response by the plaintiff. Aldisert, *supra* note 10, at 561.

Also, state court competence and bias may be less important in most § 1983 damage actions than they are in other contexts. Expertise and sympathy are important when the plaintiff wishes a lower court to anticipate the Supreme Court — to articulate a federal right that has not previously been recognized, or to expand upon a federal right that is in the process of refinement and elaboration. They may also be important when the Supreme Court has spoken ambiguously, and the plaintiff seeks a judicial ear attuned to the nuances of the Court's opinion. *See* Neuborne, *supra* note 109, at 1124-25. But, when damages are sought from an individual defendant, lower courts will seldom be asked to make these judgments. Where the law is unclear, federal immunity doctrine will usually protect the individual defendant from damage liability, and the court will not reach the question of the precise scope of the constitutional right. Where a constitutional right is so obscure that a state court is unable to discern it, it is unlikely that a state officer would be held financially responsible in any forum for failing to respect it. *See* Wood v. Strickland, 420 U.S. 308 (1975).

> *Wood* held, in the context of a suit against school board members, that a defendant is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's *clearly established constitutional rights* that his action cannot reasonably be characterized as being in good faith.

420 U.S. at 322 (emphasis added). *See also* Procunier v. Navarette, 434 U.S. 555 (1978). Professor Nahmod argues that, in addition to Wood's duty to know settled rights, there is also a requirement, articulated in the earlier decision of Scheuer v. Rhodes, 416 U.S. 232 (1974), that the defendant act reasonably even when the law is unsettled. "*Wood* operates to make it easier to find unreasonableness in that category of cases involving violations of clearly settled rights." S. NAHMOD, *supra* note 87, § 8.03, at 235. It is not clear that the Supreme Court intended the *Wood* formulation to be only partial; the opinion makes no reference to a separate reasonableness test. *See Developments*, *supra* note 3, at 1214. Nor is it clear how a separate test would be applied.

A similar immunity has been denied to municipal defendants, *see* Owen v. City of Independence, 445 U.S. 622 (1980), but municipalities are subject to liability only for unconstitutional official policy or custom. *See* Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978).

Although the federal government possesses a strong interest in providing a "supplementary" cause of action that plaintiffs may pursue in federal court, a concern exists among courts and commentators that allowing such an action will too greatly infringe the interests of the states while simultaneously imposing too great a burden on the federal courts. This unease reflects confusion over the actual sources of the tension that surrounds section 1983 litigation. That tension arises not from the "supplementary" character of section 1983 litigation but from two other sources: first, concern over the costs of extending constitutional protection through section 1983 — costs that are implicated regardless of whether state tort law would also provide relief — and second, misgivings about the propriety of awarding any damage relief for deprivations of constitutional rights.

II. The Costs of Using Constitutional Law To Vindicate Individual Rights

Expanding the scope of constitutional rights has obvious merit. But we often forget that there are other ways — such as through the common law of tort — to vindicate personal interests. We also tend to forget that the expansion of constitutional rights does entail certain costs, and, when constitutional rights can be vindicated through a federal cause of action for damages, as they can under section 1983, these costs are enhanced. First, the existence of the statutory cause of action means that every expansion of constitutional rights will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend our most significant rights. Second, every expansion of constitutional rights displaces state lawmaking authority by diverting decision-making to the federal courts.

In this Part, I explore the costs of vindicating individual rights through constitutional law rather than the common law of tort. Although the existence of section 1983 may enhance these costs in certain instances, their source is neither a flaw in the statute nor even the provision of a constitutional cause of action. These costs would exist in some form even if section 1983 were abolished. More significantly, these costs are not due to the "supplementary" form of relief that section 1983 provides. Instead, they are inherent in the expansion of constitutional protections. Thus, an attempt to avoid these costs cannot be used to justify picking and choosing among section 1983 actions brought to vindicate constitutional rights. The appropriate response must come in interpreting the scope of the Constitu-

tion. Of course, understanding this does not help us to decide which interests deserve constitutional protection and which do not. Nevertheless, such an understanding does caution restraint in deciding when the Constitution has spoken.

A. *Federal Caseload*

The desire to reduce, or at least stabilize, the number of cases brought before federal courts should be taken very seriously. Chief Justice Burger's most consistent complaint on behalf of the federal judiciary is that the bench is understaffed and overworked, and that the situation is becoming worse.[115] In this he has substantial support from his brethren and from commentators.[116]

Concern for the federal caseload does not raise problems unique to damage actions, or even to section 1983 actions. To the extent that caseload is a "§ 1983 problem," it is simply because suits brought under that statute have come to form a very large portion of the federal docket. And it is in part because of the enormous federal caseload that courts have searched for meaningful approaches aimed at reducing the amount of section 1983 litigation. Justice Stevens articulated the concerns for the expanded caseload made possible by section 1983 in a concurrence written while he was sitting on the Seventh Circuit:

> The mere fact that the plaintiff is the victim of a tort committed by a state official rather than a private party does not, in my judgment, provide an adequate basis for affording him a federal remedy. The federal interest in conserving federal judicial resources for litigation in which significant federal questions are at stake favors a construction of the Civil Rights Act which will not enlarge it to provide an alternative means of processing ordinary common-law claims.[117]

That the sheer number of section 1983 cases imposes a grievous administrative burden on the federal courts obviously presents an extremely serious practical problem, but not, at first glance, one of

115. *See, e.g.*, Burger, *Annual Report on the State of the Judiciary*, 66 A.B.A.J. 295, 297 (1980); Burger, *Chief Justice's Yearend Report, 1977*, 64 A.B.A.J. 211 (1978); Burger, *Chief Justice Burger's 1977 Report to the American Bar Association*, 63 A.B.A.J. 504 (1977); Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976).

116. *See, e.g.*, H. FRIENDLY, *supra* note 107, at 15-54; Commission on Revision of the Federal Court Appellate System (Hruska Commission), *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 394-409 (1978); Aldisert, *supra* note 10.

117. Kimbrough v. O'Neil, 523 F.2d 1057, 1066 (7th Cir. 1975) (Stevens, J., concurring), *aff'd. en banc*, 545 F.2d 1059 (7th Cir. 1976). Then-Judge Stevens was referring specifically to claims of injuries to property.

In addition, *see* Carlson v. Green, 100 S. Ct. 1468, 1481 (1980) (Rehnquist, J., dissenting), quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 428 (1971) (Black, J., dissenting).

constitutional dimensions. However, as Justice Stevens suggests, workload can seriously detract from the courts' performance. A crushing weight of cases — whatever their worth — ultimately denigrates all rights because the judiciary is not capable of sympathetically responding to all the claims. Individual judges, as a matter of self-preservation, may begin to read complaints in a grudging manner and to look for narrow resolutions that avoid the most difficult issues.[118] Or, the burden may lead to the creation of a bureaucracy — of law clerks or judges — to process the caseload. The mode in which decisions are reached and opinions written may suffer as a consequence of decreased collegiality and sense of personal responsibility. Under time and work pressures judges may be tempted — at least in routine cases, which appear to lack importance, or abstruse cases, which can be intimidating and time-consuming — to defer to the recommendations of their clerks or to other judges who are perceived to have expertise in a particular area. Opinion writing may become a bureaucratic project delegated to law clerks and increasingly divorced from the process by which the judge reaches a decision in a case. To save time and to avoid conflict, judges may hesitate to suggest changes in their colleagues' drafts, joining when they agree with the conclusion but not the rationale.[119] It may then become difficult to discern a coherent approach in a line of cases or to predict future decisions. *En banc* hearings at the courts of appeals may become so unwieldy that they are avoided, again contributing to a lack of coherent authority. Perhaps most significantly, judging may dwindle to an onerous and boring administrative task — one that cannot attract and engage committed, intelligent people. In a very practical sense, then, overextension of constitutional protection may dilute and thus debase constitutional values.

Debasement also comes about when the energy of the judiciary is dispersed among too many interests. An interest can have merit without warranting constitutional protection. Refusing to extend constitutional protection to an asserted right does not necessarily bar other means of vindication, such as state law. Owen Fiss laments, accurately, I think, that "[w]e have lost our confidence in the existence of the values that underlie the litigation of the 1960s, or, for that matter, in the existence of any public values."[120] In part, we have

118. *See* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 638 n.144 (1979).

119. For a comment on this phenomenon, see Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814, 2841 (1980) (Blackmun, J., concurring).

120. Fiss, *supra* note 88, at 17.

fallen away from the certainties of the 1960s simply because we are faced with more difficult problems.[121] But we can also blame this lack of confidence on our failure to remember that only a few particularly important concerns merit ultimate dedication. As many, often conflicting, values compete for attention, it is hard to retain commitment to any one of them.

Of course, concern about caseload — without attention to substantive arguments about rights — is not a useful vehicle for analysis. It does not help us to distinguish between suits that are "really" tort actions in some Platonic sense and those that are "really" constitutional actions. Moreover, even with more precise attention to the significance of the right asserted, any principle or result that begins from a concern with caseload seems to assume that federal litigation is a "luxury" which should be allowed infrequently and in small amounts.[122] Indeed, to begin from caseload is to put things backwards. Where rights have been determined to be of constitutional merit, caseload considerations are necessarily secondary to the vindication of those rights. It is only because the recent growth of federal litigation threatens constitutional rights that it is of more than personal concern to federal judges.

The difficulties of reaching for a bright line that will weed out less significant cases can be illustrated in the context of property claims,[123] which are often described as not presenting "a federal case."[124] The examples used by the courts and commentators are often superficially persuasive, because the amounts involved are so small that it is hard to believe that the plaintiffs are suing in good faith, given the cost of litigation.[125] To the extent that these claims are viewed as too trivial in a purely monetary sense, the caseload could be reduced (if Congress were so inclined) by imposing a juris-

121. *Compare, e.g.*, Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978), *with* Brown v. Board of Educ., 347 U.S. 483 (1954); Roe v. Wade, 410 U.S. 113 (1973), *with* Griswold v. Connecticut, 381 U.S. 479 (1965).

122. *Cf.* Huffman v. Pursue, Ltd., 420 U.S. 592, 605 (1975) (right of civil litigant to seek Supreme Court review of any federal claim that has been properly asserted in and rejected by state court).

123. *See, e.g.*, Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978); Kimbrough v. O'Neil, 523 F.2d 1057, 1066 (7th Cir. 1975), *aff'd. en banc*, 545 F.2d 1059 (7th Cir. 1976).

124. *E.g.*, Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904, 914-15 (1976) (commenting on Cruz v. Cardwell, 486 F.2d 550 (8th Cir. 1973)).

125. For example, Cruz v. Cardwell, 486 F.2d 550 (8th Cir. 1973), involved $206.00. One *pro se* request for injunctive relief and damages was based on the alleged confiscation by a prison guard of seven packs of cigarettes that belonged to a prisoner. The trial court dismissed the § 1983 petition as frivolous. The Third Circuit reversed and remanded. *See* Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973).

dictional-amount requirement for property cases. But even in property cases, where triviality can be defined in money terms, the problem is not so tractable. The Court has already experimented with a property right/personal right distinction in section 1983 cases.[126] The distinction was adopted in order to expand, rather than to limit, federal jurisdiction,[127] but it was eventually rejected[128] for reasons that are relevant whatever the purpose: it simply proved too difficult to distinguish between property and nonproperty claims;[129] and monetary characterization was found to be insufficiently sensitive to very important federally protected interests, such as the aspects of personal dignity that may be involved even in a conversion case.[130] Also, the 1871 Congress specifically contemplated that section 1983 actions would include claims that seem trivial if judged by their monetary significance. In both *Monroe v. Pape*[131] and *Carey v. Piphus*,[132] the Court quoted this language from the legislative history:

> The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.[133]

The simple desire to reduce the federal caseload provides no guidelines to help us determine the most important uses of limited federal court resources. That inquiry — which raises basic questions

126. Hague v. CIO, 307 U.S. 496, 518-32 (1939) (Stone, J., concurring) (distinguishing those cases that may be brought under the forerunner of 28 U.S.C. § 1343(c), which requires no jurisdictional amount, from those that must be brought under the forerunner of 28 U.S.C. § 1331, which had such a requirement prior to amendment by the Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486 (1980)).

127. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 958 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

Justice Stone, in *Hague*, appears to have assumed that a failure to distinguish personal rights from property rights would compel the conclusion that both categories would fall within § 1331 (and thus be subject to a jurisdictional amount requirement), rather than § 1343(3). *See* 307 U.S. at 530.

128. *See* Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).

Contrary to Justice Stone, Justice Stewart assumed that all claims would fall under § 1343(3) if the distinction proved to be untenable. HART & WECHSLER, *supra* note 127, at 958.

129. *See* 405 U.S. at 550-51.

130. *See* 405 U.S. at 552 n.21. This may be particularly true of claims brought by prisoners.

131. 365 U.S. 167, 180 (1961).

132. 435 U.S. 247, 255 n.9 (1978).

133. CONG. GLOBE, 42d Cong., 1st Sess., at app. 216 (1871) (remarks of Senator Thurman).

of constitutional law — is beyond the scope of this Paper. Nevertheless, it is significant that the concern for caseload leads us only to questions concerning the proper scope of constitutional rights. It cannot justify a principle or result that forecloses section 1983 actions brought to vindicate those rights.

B. *Displacement of State Authority*

Extending the Constitution through section 1983 actions results inevitably in the displacement of state lawmaking authority by the federal government. In what follows I discuss briefly how this displacement works and suggest more precisely why it is a cost.

Damage suits under section 1983 do not present the more obvious federalism concerns that arise when plaintiffs seek to displace the jurisdiction of a state court that has already begun to hear a case,[134] or when they procure a federal injunction that will compel changes in the operation of a state institution.[135] Unlike suits in equity, which involve a specific request to enjoin a state act, section 1983 damage suits require no conclusion that the state process is improper. Nor need there be a decision, such as that made by the Court in *New York Times Co. v. Sullivan*,[136] that a state's tort law does not come up to constitutional standards, and thus must be replaced or reformulated to meet those standards. The displacement of state authority that comes about in section 1983 damage actions occurs more subtly.

The displacement occurs simply because when an interest is granted constitutional protection, the existence or nonexistence of state law becomes, in large measure, irrelevant. Whatever choice a state has previously adopted — whether it be to provide or to withhold protection — is preempted simply because a plaintiff will usually pursue the federal remedy. The displacement is particularly insidious because there is no explicit decision that state performance is inadequate, and, thus, no clear signal to the states that their power is being eroded.

The Supreme Court's concern for the erosion of state tort authority by section 1983 litigation surfaces most clearly in Justice Rehnquist's opinion in *Paul v. Davis*.[137] The plaintiff claimed that his reputation had been injured without due process of law when the

134. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

135. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976).

136. 376 U.S. 254 (1964).

137. 424 U.S. 693 (1976).

police defendants included his picture in a flyer of "ACTIVE SHOPLIFTERS" at a time when criminal charges were only pending (the charges were subsequently dropped). Justice Rehnquist rejected the claim:

> [I]f the same allegations had been made about [plaintiff] by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since [defendants] are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment.[138]

Justice Rehnquist concluded that the plaintiff was not asserting a constitutionally protected interest; rather, his complaint "appear[ed] to state a classical claim for defamation actionable in the courts of virtually every State."[139] The Justice elaborated:

> [S]ince it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that "life" is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every cognizable injury which may have been inflicted by a state official acting under "color of law," establishing a violation of the Fourteenth Amendment.[140]

Justice Rehnquist fears that the states will be left with significantly less lawmaking authority if the Constitution is interpreted to protect interests that are also protected by state tort law. Once an interest is granted constitutional protection, a plaintiff can sue to protect that right in federal court under section 1983. To prevent this displacement of state damage actions by federal damage actions, Justice Rehnquist suggests that courts define the scope of constitutional rights narrowly — to exclude interests that have traditionally been protected by the common law.

There are three problems with the analysis in *Paul*. First, Justice Rehnquist's narrowing device — the exclusion of certain interests from constitutional protection because they traditionally have been

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138. 424 U.S. at 698.

As Justice Brennan properly pointed out in dissent, 424 U.S. at 715-16, the distinction between tortious conduct committed by a private citizen and that committed by a state official is one made by the fourteenth amendment — when that conduct can also be characterized as a deprivation of constitutional rights.

139. 424 U.S. at 697.

140. 424 U.S. at 698-99. *See also* Jenkins v. Averett, 424 F.2d 1228, 1234-35 (4th Cir. 1970) (Bryan, J., concurring in part and dissenting in part); Aldisert, *supra* note 10, at 570.

vindicated through tort law — is not promising. For one thing, a state tort law decision *not* to protect an interest may be as significant as a decision to protect it, yet Justice Rehnquist's device precludes displacement of only the latter choice. Whether a state has previously protected an interest or has left it unprotected, the extension of constitutional protection will, to some extent, render the state decision ineffective. Moreover, too many interests are undeniably protected by both the federal Constitution and the common law. Justice Rehnquist mentions life. Property is another clear example. Indeed, in the past the recognition of an interest at common law has been cited as evidence in favor of that interest's constitutional status.[141] It puts the proper analysis backwards to begin with the common law and give what is left over to the Constitution. The Constitution, according to the supremacy clause, is the higher source of law. It provides the minimum essential protections. The states can go beyond, but they cannot cut back on, these rights. Therefore, it is necessary first to define what the Constitution requires.

The second problem with Justice Rehnquist's analysis is that it overstates the implications of a finding that the plaintiff has suffered a constitutional deprivation. Justice Rehnquist's attention to the "interest" protected — an approach that may have been suggested by the analogy to tort — diverts his attention from another important constitutional question: After an interest is determined to merit protection, what protection does the due process clause require? Rehnquist states that the plaintiff's argument in *Paul* requires that constitutional tort relief also extend to a bystander accidentally shot by a policeman or a person killed by a negligent driver of a government vehicle. Those hypotheticals are troublesome. But they are not troublesome because the interest at stake should fall outside the protection of the Constitution — in both hypotheticals, that interest is life. Rather the trouble arises because of an implicit assumption about what the due process clause requires.

It is reasonable to suppose that any prior hearing requirements imposed by the due process clause apply, if at all, only to those situations in which a government or its representative has made a *deliberate* decision that threatens a protected interest.[142] The Constitution then may require process that ensures that the decision is made care-

141. *See, e.g.*, Monaghan, *supra* note 34, at 411-12, 433.

142. *See* Ingraham v. Wright, 430 U.S. 651, 674 (1977):

> There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned. But at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.

fully and with full information. The facts of *Paul* present a case where a prior hearing might be appropriate, because the police defendants made a decision to include plaintiff's picture in their flyer.[143] But it would be nonsense to ask for similar safeguards when the deprivation is accidental, as it is in Justice Rehnquist's hypotheticals.[144] While those examples involve a deprivation of a constitutionally protected interest (life), they involve no deprivation of a constitutional right because no prior[145] process was due.[146] If the

143. In this sense, a requirement that the defendant "intended" to act is implicit in one application of the due process clause, for prior hearing requirements would apply only where there had been a deliberate decision to take action. They would not be applicable, for example, to genuinely accidental shootings by police officers.

In *Paul*, there was a decision to place plaintiff's picture in a flyer depicting "active shoplifters." Whether or not this was intended as punishment, it had a predictable impact on the plaintiff that included some, if not all, of the costs of a conviction, and some safeguards, consequently, are appropriate.

Justice Rehnquist addresses this contention. *See* 424 U.S. at 706-07 n.4. He suggests, somewhat obliquely, that due process does not require safeguards for this decision because it is not the police chief's function to impose legal sanctions.

But that is precisely the point. The officers did make "affirmative determinations" that labelled the plaintiff as a criminal; that is the sort of decision that should be left to institutions with "more formalized proceedings" than those available to the police.

Justice Rehnquist could be saying that due process does not impose a prior-hearing requirement unless a criminal conviction is imposed, for only such a conviction affects "legal rights." But this argument is circular: "legal rights" are whatever the due process clause requires. And such an interpretation would leave no scope for procedural due process as a check on police behavior. Under Justice Rehnquist's interpretation, due process would be violated only by the imposition of a criminal conviction or a civil fine, and, by definition, only courts could take that step.

144. A situation that is more troublesome than those suggested by Justice Rehnquist would arise where a government actor makes a deliberate decision to harm a citizen for personal reasons. For example, is the Constitution violated when the driver of a government truck deliberately runs down her husband's mistress? A deliberate decision has been made and no safeguards utilized. Without digressing too far, I would suggest that a situation of this sort raises questions of state action, rather than due process. The inquiry, under the rubric of "state action," should be whether the government involvement has provided the actor with special authority or power that enables her to hurt others in ways not available to private citizens. There is no such authority in the truck driver case, for a government truck cannot do any greater harm than any other truck. My answer would be different were the actor a policewoman who shot, beat, or jailed her rival, for the government has given the police a special authority to engage in actions that ordinary citizens may not.

145. A post hoc damage remedy may be constitutionally required. *See* Ingraham v. Wright, 430 U.S. 651 (1977); Monaghan, *supra* note 34, at 431.

146. A similar case is Martinez v. California. 444 U.S. 277 (1980), an action for damages brought by the survivors of a fifteen-year-old girl who had been murdered by a parolee. Plaintiffs argued that defendant officials, in releasing the parolee, had deprived the decedent of life without due process of law. Justice Stevens, for a unanimous Court, found no constitutional violation on the ground that the murder was "too remote a consequence," 444 U.S. at 285, of official action to be a "deprivation" by the state. His opinion in support of this holding is exceptionally brief and conclusory; it relies, for instance, on the fortuity that the murder occurred five months after the parole.

It is difficult to see how it can be honestly denied that plaintiffs' decedent was "deprived" of her life, and that the state played a significant role in causing her death. This conclusion can be avoided only by the arbitrary or policy-based "proximate cause" limitations familiar from tort law. Justice Stevens asserts that the murder was "too remote" from the parole officers' decision, but it was certainly the sort of possibility that a parole board could be expected to

Constitution does not speak to these cases, there is no displacement of the common law.

The third problem with Justice Rehnquist's analysis in *Paul* is that he makes clear his underlying concern — to preserve some role for state tort law — without giving us any clear idea of why preservation is valued. Of course, in the most general terms, without reference to tort law in particular, the desire to retain a place for state law derives from the vision of a federal system in which states are active components that attract their own loyalties and serve as a counterforce to the national government. But this vision is too abstract to give much guidance.

When the question is addressed with specific reference to the importance of preserving state authority to develop tort law, the arguments have not been stated much more clearly. Justice Frankfurter, in his dissent to *Monroe*, does little better than Justice Rehnquist:

> The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.[147]

Like Justice Frankfurter, many judges and commentators fear that diminution in state lawmaking authority entails significant costs

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foresee and to consider before making its decision. In this case, unlike the negligent driving hypothetical, the government has made a conscious decision that it had reason to foresee would affect the lives of citizens in significant ways.

Yet, there is another respect in which *Martinez* is very much like the case of a negligent government driver. Justice Stevens touches on this when he points out that "the parole board was not aware that [plaintiffs'] decedent, as distinguished from the public at large, faced any special danger." 444 U.S. at 285. It is harsh to argue that this fact breaks the "causal chain," but it does call attention to the limits of what the Constitution can require in the name of due process.

Plaintiffs claimed that certain "requisite formalities" were not observed by the Board. Justice Stevens does not reach the question whether the decedent received all the process that was due her. *See* 444 U.S. at 284 n.9. That question cannot be avoided. But due process may ask relatively little of the parole board in the *Martinez* situation. The victim of governmental action of this sort cannot expect to be heard at the time that the decision is made, for the simple reason that she cannot be identified. In the due process context, it may make a difference that the specific victim, unlike the class to which she belongs, is not foreseeable at the time that the decision is made. Her interests can only be considered as those of a class. Attention to the public interest may be all that can be asked of officials under these circumstances. And there is no constitutional guarantee against mistake. Presumably, state tort law permits the victim's survivors to proceed against the murderer for damages. *See* note 145 *supra*. Like any damage remedy for serious personal injury, this is inadequate recompense, but it may be all that the state can be asked to do.

147. 365 U.S. at 237. *See also* Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971) (interpreting 42 U.S.C. § 1985(3) (1976)); Snowden v. Hughes, 321 U.S. 1, 16 (1944) (Frankfurter, J., concurring) (interpreting the state action requirement of the fourteenth amendment).

even where it is justified by the need to protect constitutional rights. These concerns are well-founded because even the most justified section 1983 action intrudes upon the historic role of the states as guardians of the security of person and property. But, although there is no easy way to define an appropriate line between state and federal authority, we can more precisely identify the costs of displacing state authority to make tort law governing these disputes. In what follows, I will discuss four aspects of the costs that are implicated in section 1983 cases: (1) the decline in the states' capacity to protect individual liberties, (2) the preemption of state authority to set standards for the behavior of its own officers, (3) the replacement of common-law processes with a process that is less democratic, and that produces less flexible and less easily altered rules, and (4) the loss of substantive contributions by state lawmakers to the development of federal law.

A decline in the states' capacity to articulate and expand individual liberties may occur simply because their citizens will no longer view them as the "primary guardians of that fundamental security of person and property." It has been argued that as people increasingly look to the federal government for protection, the states will atrophy and become less competent to define civil liberties.[148] We need not go so far. It is sufficient cause for concern that state institutions may not be perceived as sources of rights. Citizens with that perception are less likely to turn to the states for protection of their rights.

The reaction of the press to the Supreme Court's decision in *Ingraham v. Wright*[149] demonstrates that citizens have already become accustomed to thinking of federal law alone as the source of civil liberties. The Court found no constitutional violation in *Ingraham* because state tort law sufficiently protected a disciplined student's interest. There was no deprivation of a federal right to due process of law because the plaintiff possessed the right under state tort law to be free from severe corporal punishment. The Court said that that is all due process requires. Whether or not this reasoning was sound,[150] the press read the opinion as something quite different, as

148. *See* Neuborne, *supra* note 109, at 1129.

149. 430 U.S. 651 (1977).

150. The rules of tort law may play a role in answering questions about the scope of constitutional protection and about what the Constitution requires, but this role is very specific, defined by the particular constitutional provision in question.

It is not enough to assert generally that tort law is already doing the job that the plaintiff seeks to impose on the Constitution. On the contrary, certain constitutional provisions — such as the reference to "life, liberty, or property" in the due process clause — may be defined to incorporate interests protected by the common law. *See* text at note 94 *supra*.

But the existence of common-law remedies may, in certain situations, be a basis for a deci-

an endorsement by the Supreme Court of the teacher's right to engage in corporal punishment. Such a reading implies that the Constitution, and the federal government, are the only significant sources of civil rights.

Even when the possibility of state protection is understood, the expansion of federal rights during recent decades has created an expectation that the federal government will protect any nontrivial interest. This expectation reduces the incentive for the states to construct adequate protection.[151] And, because state judges face election pressures that federal judges do not,[152] they may be only too happy to avoid unpopular decisions by leaving the hardest questions about individual rights to the federal courts.[153]

The second sort of cost implicated in constitutional tort actions arises because section 1983 litigation typically involves the assertion of rights against state officials.[154] Because constitutional standards limit the permissible scope of official action, states are partially foreclosed from self-regulation. Section 1983 litigation, in other words, interferes with the states' ability to manage their own governmental activities by allowing federal judges to set standards for state officers and to punish those officers for missteps.[155]

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sion that the Constitution has not been violated. For example, if the scope of a liberty or property interest is said to be determined by the protections that a particular state has provided, *see, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976), it may be very precisely described as, say, "the right to receive money damages in a civil action when one is defamed." Where a citizen has been defamed by a state officer, the Court may decide that the plaintiff has asserted a protected interest, but that there has been no "deprivation" of that interest by the state because the interest has not been impaired — that is, the plaintiff can bring a state tort claim for damages. In other words, there is no "deprivation" because the status of the interest under state law remains unchanged. *See* Monaghan, *supra* note 34.

A more direct, and less fictional, approach is that taken by the Court in *Ingraham*. There the Court considered the after-the-fact tort remedies, not as part of the definition of the protected interest, but as all the process that is due. *See* 430 U.S. 651 (1977). *See also* Monaghan *supra* note 34, at 431. In the context of a school disciplinary action, the analysis would go as follows: A school official may have deprived the student of a "liberty" interest, but due process requires no hearing prior to that deprivation. All that is constitutionally required is that the student have an opportunity to seek damages in a subsequent tort action.

151. Justice Brennan has felt it necessary to remind litigants that states may be the source of more expansive protections than the Supreme Court is willing to find in the federal Constitution. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

152. *See* Neuborne, *supra* note 109, at 1127-28.

153. *See* Aldisert, *supra* note 10, at 562.

154. A private person may be a § 1983 defendant when he acts "under color of" state law — for example, when he participates in joint action with agents of the state. Such a private individual may be liable for damages even where the state officials with whom he acted are protected by immunities. Dennis v. Sparks, 101 S. Ct. 183 (1980).

155. The Supreme Court has recently emphasized, in overturning federal minimum wage and maximum hour regulation of state employees, that "Congress may [not] withdraw from the States the authority to make those fundamental employment decisions upon which their

Aside from the intrinsic propriety of allowing each level of government to determine how its own officers will behave, there are two respects in which state judges and legislators may be more capable of defining the norms of official action than federal decisionmakers.[156] First, state judges, unlike federal judges,[157] are experienced in setting standards of behavior in tort actions between private individuals. This expertise, plus the breadth of vision that comes from seeing a range of cases involving similar problems,[158] may better equip them to resolve cases brought against state officials as individuals. They are also more accustomed to dealing with questions such as causation and fault, which are deceptively simple, but which raise the most difficult problems of individual culpability. Such questions of culpability arise in damage actions under section 1983, as well as under the common law.[159]

Second, state decisionmakers are more likely to understand the political, financial, and historical constraints under which local officials act. Indeed, they may be too sensitive to these constraints, and insufficiently sympathetic to opposing claims based on individual

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systems for performance of [the] functions [of administering the public law and furnishing public services] rest." National League of Cities v. Usery, 426 U.S. 833, 851 (1976).

Usery has directed renewed attention to the view that there exists an enclave of exclusive state authority to govern certain substantive areas. Until *Usery*, it had appeared that no area of substantive law was wholly reserved to the states. *See Developments*, *supra* note 3, at 1177-78. *Usery* is ambiguous, *see id.*, but it raises the possibility that the tenth amendment protects substantive enclaves of state authority that cannot be reached by Congress even under that body's article I powers. Although tort law has been generally considered to be an area in which the states are to exercise substantive authority, there is little likelihood that the power to devise standards of human conduct, defined broadly, or even the power to regulate official conduct, will constitute one of these enclaves, if any exist. Other provisions of the Bill of Rights, from the first amendment on, clearly impose specific limitations on official behavior, and some provisions, most notably the thirteenth amendment, limit private behavior. Moreover, in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court decided that Congress' powers under the fourteenth amendment are sufficient to justify inroads on the eleventh amendment. The eleventh amendment limits federal judicial power over suits against states. It provides a protection of state prerogatives much more explicit than that in the tenth amendment, which was the basis of *Usery*. Nevertheless, *Usery* is a reminder that the Court, when it wishes, can take the independent status of states and their authority over their own officers very seriously.

156. The argument that state decisionmakers should be allowed to define the norms for behavior of state officials may seem naïve in light of the common state practice of exempting officials from tort liability under common-law doctrines granting them immunity. *See* F. HARPER & F. JAMES, *supra* note 64, § 29.10, at 1638-46. But these common-law immunities are not everywhere comprehensive. *See id.* And, where they exist, they simply represent a choice by the states to use other means to impose standards of behavior on state agents. These means may include discipline, discharge, criminal sanctions, and, for elected officials, political accountability.

157. Lower federal judges are exposed to state tort actions through diversity cases brought under 28 U.S.C. § 1332 (1976), but Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), requires that they play a derivative role that restricts them in ways that a state judge is not restricted.

158. *See* O. HOLMES, THE COMMON LAW 120-24 (1881).

159. *See* text at note 254 *infra*.

rights; that is one of the arguments for a federal damage action to vindicate constitutional rights. Nevertheless, losing this understanding is a cost, and a decision by a federal court unfamiliar with local constraints may place a special burden on the administration of local government.[160]

The third cost of displacing state lawmaking authority arises because of differences between common-law decisions and constitutional decisions, differences that often make common-law solutions preferable. Common-law decisions can be characterized as more democratic, more responsive to the demands of the whole community. This is true simply because they are subject to legislative change by majority vote, with no need to employ the extraordinary processes of constitutional amendment.

There are other ways in which constitutional solutions are relatively inflexible. For instance, a constitutional answer is, in a sense, intended to end debate[161] — though often it fails to do so. Moreover, a certain amount of ossification inevitably follows any conclusion that an interest merits constitutional protection. This is true because such a conclusion inevitably is phrased with reference to eternal national values so that it is difficult later for the Court to retreat. In addition, the public, if not the Court, may give a decision broad significance beyond the specifics of the case in which the decision was made. And when justices who sit in the seat of national government devise rules of nationwide application and significant duration, they often think and speak abstractly. They may reach conclusions without sufficient concern for context, especially for political context of the sort that cannot be easily brought to their atten-

160. Supreme Court decisions in recent years have articulated this concern most forcefully in cases, such as Rizzo v. Goode, 423 U.S. 362 (1976), where the plaintiff has sought to use federal equity power to reform local institutions. But, as I demonstrate in Part III, damage liability can also be disruptive. For the moment, it suffices to mention the financial drain of litigation and of adverse judgments, *see* Owen v. City of Independence, 445 U.S. 622, 670 (1980) (Powell, J., dissenting); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 958 (1976), the discouraging impact of determinations of liability on employee morale, and any deterrent effect that the threat of liability creates. These disruptions may be very significant when the constitutional claims alleged are based on prison conditions or police behavior, for the potential number of claimants and the number of incidents that provide at least the pretext for litigation may be very high. Detroit has paid judgments amounting to more than $14 million in police brutality and false arrest civil cases since 1970. Detroit Free Press, § A, at 3, col. 3 (April 8, 1980).

Moreover, in some respects damage liability is more intrusive than equity. An equity decree can be drafted to give clear directions about how to handle particular problems. Damage remedies function retrospectively, and their effects on local practices are difficult to control. *See* text at notes 218-35 *infra*. Thus, whenever constitutional protection is extended through § 1983 — whether the relief is equitable or legal — there is interference with the state governments' ability to manage their own activities.

161. *But see* Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

tion through incorporation in a trial record.[162] They may generalize from the dramatic situation before them — a shocking record of police abuses in a particular city, or the abhorrent racist practices of a few states — to devise rigid and far-reaching rules that leave inadequate room for changes over time or variations in local conditions. Tort rules are, in contrast, of narrow geographical scope, easy to modify, and typically framed to be responsive to the facts of particular cases.

A final cost of displacing state authority, of diverting cases from state tort law to federal constitutional law, is the loss of substantive contributions to legal theory by state decisionmakers. We often overlook the possibility that federal law, particularly constitutional law, may profit from its coexistence with a strong common law. For example, state tort law — because of its tentative nature and the ease with which its errors may be redressed — can anticipate values that may eventually be found to merit constitutional protection.[163] Privacy, for example, has been a slippery concept for both common law[164] and constitutional law.[165] The tort law of many states, using doctrine derived from ancient concepts of property,[166] protects individual privacy interests in person and property. The Constitution, through the fourth amendment, also protects such interests. In early fourth amendment opinions the Supreme Court found that reference to common-law doctrine gave its opinions stability and persuasive force.[167] The common-law concepts were rigidly applied[168] and eventually rejected,[169] but they provided a bridge to more sophisticated doctrine. The Court's more recent forays in the name of privacy, those tethered to the more obscure constitutional moorings described in *Griswold v. Connecticut*[170] and its successors,[171] have met with less success. I believe that part of the reason for this is that

162. *See generally* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

163. Thus, the fact that the common law has traditionally protected reputation, *see* Paul v. Davis, 424 U.S. 693, 697 (1976), tells us something about reputation's relation to notions of human dignity.

164. *See, e.g.*, Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

165. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

166. *See* Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

167. *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928).

168. *Compare* Silverman v. United States, 365 U.S. 504 (1961), *with* Goldman v. United States, 316 U.S. 129 (1942).

169. *See* Katz v. United States, 389 U.S. 347 (1967).

170. 381 U.S. 479 (1965).

171. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

the recent efforts cannot refer to a history of deliberation and reflection under the common law. Meanwhile, other interests — most notably those involved in the disclosure of intimate details of one's life, or in the use of one's name and face — have received their only protection from the common law.[172] Common-law cases may eventually provide a footing for constitutional recognition of these privacy interests.[173]

The arguments for preserving a strong common-law tort system are persuasive in many respects. However, these arguments become irrelevant once we determine that the Constitution does indeed protect a given interest against a given act. The Constitution and section 1983, by their terms, embody a choice to bear certain costs to vindicate fundamental rights. Therefore, particular actions under the statute cannot rationally be discouraged on the ground that such costs are implicated. This point was frequently and compellingly made by commentators writing in the 1960s in response to the question whether respect for states required tolerance of overt racial segregation and discrimination.[174] Where a clear constitutional minimum exists, the diversity that results from deference to states is tolerable only above that line.[175]

Nevertheless, we still must understand the arguments in favor of resolving disputes through the common law rather than through the Constitution. We must understand that the costs described above are implicated in every section 1983 action based on the Constitution. Moreover, we must recognize that we face more complex questions than those at stake in the 1960s. When constitutional requirements are less clear and the need for national standards less pressing, concern over federal caseload and the common-law contributions of the states may properly play a role in deciding whether an asserted constitutional right exists.[176] But in that inquiry they serve only a secondary purpose — as a caution, a reminder of restraint.

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172. *See, e.g.*, Briscoe v. Reader's Digest Assn., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

173. Compare Professor Monaghan's argument that the word "liberty" as used in the due process clause "should be read to embrace what the tort law is now in the process of proscribing" through the emerging tort loosely called "intentional infliction of mental distress." Monaghan, *supra* note 34, at 433.

174. *See, e.g.*, B. MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964).

175. *See Developments*, *supra* note 3, at 1182.

176. *See* note 150 *supra*.

III. The Difficulty with Tort Remedies for Constitutional Wrongs

The second source of judicial and academic discomfort with section 1983 is the statutorily decreed remedy of damages. In contrast to the problem of constitutional extension, the problem here is not whether the Constitution has been violated, but what a court should do in response to an acknowledged violation. Section 1983 provides for both monetary and equitable relief where the plaintiff can establish a constitutional deprivation at the hands of one acting under color of state law. However, the assumption has been that here, as elsewhere, a money award is the "normal" form of relief, while equitable relief is "extraordinary." Consequently, courts have developed a complex and somewhat sophisticated body of law to determine the propriety of granting injunctions and declaratory judgments,[177] while similar attention has not been paid to whether damages are appropriate. Nevertheless, judicial decisions offer indications, often muted, that damage awards may entail unique costs in many section 1983 cases — costs that lead the courts to deny relief even where it appears to be quite clear that a constitutionally protected interest has been infringed.

The courts' reluctance to grant damages in all cases in which rights have been violated is well-founded, as I shall demonstrate. Unfortunately, however, the tendency to think of damages as a "normal" remedy with no special problems of its own has led some courts to translate their ambivalence about damages into a general distaste for section 1983 actions. In certain situations judges have not adequately considered whether an equitable award would be an appropriate judicial response to a constitutional deprivation even though a damage award would be inappropriate.

In this Part, I argue that a nonmonetary equitable award is, in many cases, the more appropriate judicial response. I also argue that damage awards are especially inappropriate where the defendant is an individual rather than a government entity. I first discuss why damages are often troubling when awarded in section 1983 cases with emphasis upon their failure to perform, in these cases, the functions traditionally ascribed to money relief. I then demonstrate why damages are especially inappropriate when awarded against individual defendants. Finally, I describe an approach that courts might

177. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37 (1971).

follow to decide questions concerning appropriate relief in section 1983 cases.

A. *The Preference for Equitable Remedies in Section 1983 Litigation*

I believe courts should prefer equitable remedies to damages in most constitutional section 1983 suits because money judgments often disrupt local government to a greater degree than the returns in the vindication of constitutional rights can justify. Equitable relief can have fewer disruptive side effects, while promising to be more effective in changing official behavior. This rational, if often unacknowledged, preference for equitable remedies lies at the root of judicial ambivalence toward the use of damages as a remedy for constitutional wrongs. Below I trace this ambivalence through its manifestation in a variety of section 1983 doctrines developed by courts and commentators. Then I demonstrate that partly because of this ambivalence, damage relief under section 1983 is simply not performing the functions conventionally said to be served by such relief.[178] I conclude that two of these functions — deterrence and affirmation of the plaintiff's right — can be better accomplished through equity, while a third — compensation — is not adequately performed by section 1983 litigation and could be better served by a system of administrative remedies. Damage actions should be preserved only where necessary to serve a final purpose — punishment.

1. *Ambivalence About Damage Remedies*

Ambivalence about damage remedies has been manifested in numerous judicial doctrines that, cumulatively, have imposed drastic limitations on the frequency and size of damage awards under section 1983. Here, I refer to such barriers to recovery as immunity doctrine, requirements of proof of actual injury, restrictions on vicarious liability, and requirements of proof of causation. Although the effect of these doctrines in some cases has been to dispose of section 1983 actions altogether, the opinions suggest that it is the damage remedy that often is most troubling to the courts.

The ambivalence described above is most explicit — if still veiled and unfocused — in the Court's discussions of immunities from damage judgments. The Court has granted executive officials a qualified immunity from liability under section 1983.[179] In *Wood v.*

178. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979).

179. *See* Butz v. Economou, 438 U.S. 478 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974).

Strickland,[180] the Court wrote that this immunity requires a court to consider whether the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or [whether] he took the action with a malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]."[181] Unless either of these conditions is found to exist, the defendant is immune from liability.[182] In other words, under *Wood*, an individual defendant may be held liable only when he acts in bad faith or when the right he has violated is so well defined that its existence should have been clear to him.[183] The rule forecloses damage awards in some cases where there is no question that the plaintiff has suffered a constitutional injury.

Plaintiffs face a different sort of barrier when they seek to recover damages from governmental entities. First, the Supreme Court has held that states enjoy unqualified immunity from liability for the acts of state and local officials by virtue of the eleventh amendment.[184] Second, although cities and other government units sued under section 1983 have not been given a good-faith immunity,[185] the Supreme Court has said that government defendants are not to be held liable under section 1983 "unless action pursuant to official . . . policy of some nature caused [the] constitutional tort."[186] This means that a local government entity "cannot be held liable under § 1983 on a *respondeat superior* theory."[187]

The Supreme Court has also defined very narrowly the sorts of injuries for which compensatory damages will be awarded. In certain respects, constitutional tort actions are appropriately, if not per-

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See also Wood v. Strickland, 420 U.S. 308 (1975) (qualified immunity applies to school administrators and school board members).

180. 420 U.S. 308 (1975).

181. 420 U.S. at 322.

182. There is some possibility that the scope of this immunity will vary depending on the constitutional right claimed by plaintiff. *Cf.* note 87 *supra* (whether § 1983 recovery requires a showing of actual injury may depend on the constitutional interest involved).

183. Therefore, where equity cannot be a vehicle for definition of rights because of immunities, *see* Supreme Court of Va. v. Consumers Union, 100 S. Ct. 1967 (1980), mootness, or federal abstention, O'Shea v. Littleton, 414 U.S. 488 (1974), the plaintiff has no avenue through which to seek a federal affirmation of his constitutional rights.

184. *See* Quern v. Jordan, 440 U.S. 332 (1979). *See also* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam) (holding that the eleventh amendment barred a suit in equity against Alabama and its Board of Corrections).

185. *See* Owen v. City of Independence, 445 U.S. 622 (1980).

186. Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978).

187. 436 U.S. at 691.

fectly,[188] analogized to intentional torts.[189] The Constitution, like the common law, defines certain actions that society will not tolerate, and legal redress is provided in part because social morale requires compensation.[190] Yet, in *Carey v. Piphus*,[191] described above,[192] the Court left little scope for the redress of dignitary injuries under section 1983 of the sort that is available for certain dignitary injuries at common law.[193] In *Carey*, the Court addressed whether damage relief should be awarded to schoolchildren who had been suspended without procedures required by the Due Process Clause. Although the Court purported to reaffirm and further the goal of compensation in section 1983 litigation, it narrowly defined the situations in which compensation is appropriate.[194] It was unwilling to presume that a plaintiff who has suffered a constitutional deprivation has therefore suffered significant personal injury. The Court apparently believes that granting significant presumed damages under section 1983 would simply be giving the plaintiff a windfall. It held that only actual damages for physical or psychic injuries of the sort cognizable "in most tort actions"[195] are available under the statute. Nominal damages are available to acknowledge that a deprivation has occurred,[196] but the opinion assumes that a constitutional wrong, without more, is essentially a wrong to society as a whole.[197]

188. Certain trespasses are actionable at common law, not because they are prohibited, but because it is appropriate to require the defendant to assume the costs that he has imposed on another in his own interest. *Compare* Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910), *with* Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908).

189. Professors Yudof, *see* Yudof, *supra* note 10, at 1371-74, and Love, *see* Love, *supra* note 91, at 1261, argue that § 1983 actions are most appropriately analogized to common-law dignitary torts, such as defamation, false imprisonment, and invasion of privacy. In such actions the common law allows the recovery of presumed general damages. The Supreme Court, in Carey v. Piphus, 435 U.S. 247, 262-64 (1978), rejected that analogy and refused to allow more than nominal recovery unless damages are proved.

190. *Cf.* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1554 (1972) (legal redress establishes openness of courts to claims of governmental invasions of private rights); Katz, *supra* note 103, at 41 (remedial implementation of constitutional interests in liberty determines their reality).

191. 435 U.S. 247 (1978).

192. *See* text at notes 86-91 *supra*.

193. *See* note 189 *supra*.

194. That a federal action is available even when state law would fully compensate the plaintiff indicates that a § 1983 action serves purposes in addition to compensation. *Carey* seems to indicate that the awards in many § 1983 actions will not, at least in theory, differ significantly from analogous state tort awards. The injuries for which the plaintiff will be compensated and the requirements of proof are virtually identical. Indeed, where the state is willing to award presumed general damages, the common-law award may be larger.

195. 435 U.S. at 262.

196. 435 U.S. at 266-67.

197. "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance *to organized society* that those rights

The Supreme Court has also demonstrated its concern with the inappropriateness of awarding damages under section 1983 through its insistence on evidence of causation.[198] Although it has not always been limited to damage cases, this requirement seems to derive from the structure of a damage action — the conclusion that the defendant should pay for the plaintiff's injury assumes that the defendant is in some part responsible for that injury.[199] But, there is nothing in section 1983 that requires this. The duty imposed on the official to refrain from intruding on certain interests, and the standard of care to which he must adhere, are derived from federal law.[200] We cannot know if the defendant has caused harm through breach of his constitutional duty unless we know the scope of this duty. Nevertheless, courts have employed a causation requirement to defeat a plaintiff's recovery without addressing whether the defendant breached a constitutional obligation. For example, the Third Circuit's conclusion, in *Howell v. Cataldi*,[201] that a bystander policeman does not "cause" harm to a plaintiff beaten by other policemen in his presence[202] assumes that an officer has no constitutional obligation to protect those in custody from abuse by other policemen.[203] This wooden application of a causation requirement seems to reflect a judicial ambivalence about damage remedies.[204]

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be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury." 435 U.S. at 266 (emphasis added).

198. *See, e.g.*, Martinez v. California, 444 U.S. 277, 285 (1980); Carey v. Piphus, 435 U.S. 247, 260 (1978); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

199. *Cf.* Triplett v. Azordegan, 570 F.2d 819 (8th Cir. 1978) (section 1983 action against prosecutor who knowingly obtained tape of a drug-induced confession was dismissed because the prosecutor had not been involved in the criminal trial); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972) (section 1983 action against police officers for assaulting plaintiff was dismissed for want of identification of officers participating in the assault).

200. *See* Nahmod, *supra* note 10, at 13.

201. 464 F.2d 272 (3d Cir. 1972).

202. *See* 464 F.2d at 282-83. The Court applied principles derived from 6 C.J.S. *Assault and Battery* § 27 (1975), and distinguished RESTATEMENT (SECOND) OF TORTS § 433B (1965).

203. *But cf.* Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) (police officer has a duty imposed by his office to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge); Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (prisoner may sue for being confined in a prison where violence and terror reign).

204. A strict view of causation has been adopted on occasion in equity cases as well. The most notable example is *Rizzo v. Goode*, 423 U.S. 362 (1976). In that context, the requirement seems especially out of place.

The Supreme Court in *Rizzo*, like the Third Circuit in *Howell*, assumed a narrow definition of constitutional duty. In *Rizzo*, the Court reversed an injunction that would have required the mayor of Philadelphia and other municipal and police officials to take steps to reduce police misbehavior. The Court based its decision on, among other things, its conclusion that the defendant administrators had not been personally shown to have "caused" the deprivation

Other doctrinal suggestions that would limit recovery under section 1983 also appear to be responsive to the implications of personal responsibility that are inherent in damage awards. For this reason, although they may be phrased in terms that would bar equitable relief as well, I believe that they are properly understood as indicating misgivings about monetary relief. For instance, ambivalence about damages can be detected in efforts to limit the reach of section 1983 by defining the purpose of the statute quite narrowly. For instance, Professor Shapo emphasizes that the statute was passed in response to widespread outbreaks of violence that were either tolerated by or beyond the control of state authorities.[205] He relies on this history to suggest that the plaintiff be required to show that the defendant's conduct exhibits "a brutality or arbitrariness which goes beyond the garden variety state tort action" or "that a theoretical system of local law [has] become so corrupt as to be virtually non-existent."[206] In effect, Professor Shapo would limit liability under section 1983 to situations where the defendant's conduct — or its context — represents an abuse of state power even beyond that necessary to violate the fourteenth amendment.[207] Although the challenged conduct would infringe the plaintiff's fourteenth amendment rights, section 1983 would provide no relief, legal or equitable, unless conditions approach those in the South in 1871.

It has also been suggested that courts may appropriately require a section 1983 plaintiff to establish that the defendant is "at fault" in some sense before relief can be awarded.[208] A requirement of this sort can be derived from a pedantic reading of the language of sec-

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of the plaintiffs' rights. *Id.* at 371. This conclusion assumes, of course, that the administrators have no constitutional obligation to ensure that authority is not abused by their subordinates.

Therefore, the opinion seems to ignore the commonplace observation that, beyond an elementary level, causation requirements reflect policy decisions about the scope of responsibility and thus rest on the definition of the wrong done to the plaintiff. But there is another, and even more serious, flaw in the reasoning in *Rizzo*. Policy decisions about attributions of responsibilty may also vary with the character of the relief requested. We may believe that an official (or a municipality) is not so responsible for another's injuries that he should be forced to bear their cost, yet agree that there is sufficient responsibility to justify an equitable order that similar injuries be minimized in the future. The decision in *Rizzo* assumes that "causation" means the same thing whether the relief sought is equitable or legal.

205. *See* Shapo, *supra* note 10, at 279-81.

206. *Id.* at 327-28.

207. The fourteenth amendment prohibits only action in which there is state involvement. There are constitutional guarantees against private abuses of certain sorts, for example, under the thirteenth amendment, *see, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (42 U.S.C. § 1981 (3)); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (42 U.S.C. § 1982), but the fourteenth amendment does not address these rights. Nor does § 1983, which was designed to vindicate the fourteenth amendment, and which reaches only conduct "under color of" state law.

208. *See* Nahmod, *supra* note 10, at 13.

tion 1983. For example, the statutory requirement that the defendant have "subject[ed]" the plaintiff, "or cause[d him] to be subjected" to the deprivation of constitutional rights could, with some strain,[209] be read to imply that the defendant not only must have caused the harm, but also that he must have acted intentionally or negligently, to deprive the plaintiff of his rights.[210] Or, with even greater strain, the statute's reference to "deprivation" of rights could be read to require something more than negligent behavior.[211]

There has also been debate among both courts[212] and commentators[213] over whether, apart from the statutory language, section 1983 actions intrinsically presuppose some showing that the defendant is at fault and, if so, whether proof of negligent behavior is sufficient to meet that requirement.[214] It has been argued that only intentional or reckless conduct is covered by section 1983, on the ground that only conduct of this sort can be deterred by the prospect of liability. Again, although the "fault" requirement may be described as applying to suits in equity as well as damage actions, it seems to be derived from an analogy to the concepts of responsibility articulated in the development of the common law of torts.

2. *The Failure of Section 1983 Damage Awards to Fulfill Their Purposes*

The numerous barriers to section 1983 recovery that are described above not only demonstrate ambivalence about damage relief, but mean that, in a very substantial number of constitutional tort cases, damages are not available to fulfill the goals conventionally said to be served by a tort action — deterrence, affirmation of the plaintiff's right, punishment and compensation.[215] This suggests, first, that we are not as committed to using damage actions to fulfill these goals in section 1983 cases as our rhetoric would indicate, and, second, that the time has come to admit that equitable

209. The distinction between "subjected" and "cause to be subjected" is itself ambiguous, and suggests that "causation," whatever that means, is not essential.

210. *See* Kirkpatrick, *supra* note 10. The Supreme Court granted certiorari on this issue but found it unnecessary to resolve it in Procunier v. Navarette, 434 U.S. 555, 566 n.14 (1978), and Baker v. McCollan, 443 U.S. 137, 139-40 (1979).

211. *See, e.g.*, Jenkins v. Averett, 424 F.2d 1228, 1234 (4th Cir. 1970) (Bryan, J., concurring in part and dissenting in part).

212. *See, e.g.*, Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978).

213. *See, e.g.*, Kirkpatrick, *supra* note 10; Nahmod, *supra* note 10, at 16-22.

214. *See Developments*, *supra* note 3, at 1218.

215. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979).

actions may be a preferable form of judicial redress for constitutional injuries.

Deterrence. Courts and commentators frequently refer to the tendency of section 1983 liability to deter state activities that infringe constitutional rights.[216] Indeed, deterrence may be more important in the section 1983 context than it is in many common-law tort actions because the conduct for which damages are sought is also conduct that is prohibited. But damages may not be the most appropriate way to address constitutionally prohibited conduct. Damage liability is a "general" deterrent; it works by imposing costs on harmful activities.[217] When the activity is one that is prohibited, this form of deterrence is both harsh and relatively ineffective. It imposes great costs on state and local governments, costs that may outweigh the gain to federal interests. For three reasons, it is often more simple and less burdensome to give a clear message — that the defendant's conduct must change or cease.

First, with regard to any particular defendant, the deterrent effect of potential section 1983 liability is likely to be quite attenuated. Judgments arising from suits brought by individual victims are inevitably ad hoc and sporadic. The possibility that an official will be liable for any particular misstep is relatively remote, for section 1983 relies on private plaintiffs to enforce public policy against official misconduct. Suit will be brought only if the victim has financial resources,[218] legal advice, patience, and a sense of outrage. The limitation of damages in *Carey* to actual damages, with only nominal damages available for vindication, removes a significant financial incentive to sue.[219] And, where actual injury can be proved, the plaintiff's inability to use vicarious-liability theories to proceed against high-level officials or the local government itself,[220] as well as strict

216. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 651-52 (1980); Nahmod, *supra* note 10, at 10; Yudof, *supra* note 10, at 1369.

217. *See, e.g.*, G. CALABRESI, THE COST OF ACCIDENTS 21 n.4 (1970).

218. The need for financial resources may have been significantly alleviated by the possibility of recovering attorney's fees from the defendant, *see* Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), and by the recent Supreme Court decision striking down prohibitions on price advertising of "routine legal services" by attorneys. Bates v. State Bar, 433 U.S. 350 (1977). Of course, the promise of the Attorney's Fees Award Act depends for its realization on successful litigation against a defendant with financial resources.

219. The Court in *Carey* stated: "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." 435 U.S. at 256-57. The Court did leave open the possibility that "exemplary or punitive damages might . . . be awarded in a proper case." 435 U.S. at 257 n.11. *See also* Carlson v. Green, 100 S. Ct. 1468, 1473 (1980).

220. Monell v. Department of Social Servs., 436 U.S. 658, 691-95 (1978).

standing and causation requirements, may mean that the only available defendant is a poorly-paid official without the resources that would justify suit.[221] If the plaintiff decides to proceed against that individual, he may find the defendant protected by immunities that bar recovery unless the defendant has acted in bad faith or in derogation of a clear constitutional right.[222] Because of these immunities,[223] in the absence of a possible action against a municipal employer, damage liability serves no deterrent function at all wherever the commands of the Constitution are ambiguous and unclarified by the courts.[224] When all these hurdles are passed, the plaintiff (particularly if he is a convicted criminal claiming prison or police abuse) may face a jury that finds his credibility suspect, his appearance distasteful, and his claim weak.[225]

Second, an award against the individual who appears responsible is not the most effective way to promote the changes that are necessary to avoid future injuries. Many constitutional injuries result at bottom from "systemic problems" within government institutions, rather than from the specific acts of one who superficially may appear to be responsible. These injuries will not be eliminated unless systemic changes are made.[226] This is particularly true of claims

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221. *Carey* also accepted the proposition that, in a procedural due process case, a defendant could defeat a claim for damages by demonstrating that the plaintiff would have suffered these damages in the absence of a due process violation — for instance, that a dismissed employee would have been fired even if a proper hearing had been held. This rule makes sense if the purpose of the action is compensation for injuries incurred; it makes less sense if the action is to serve a significant role as a deterrent.

222. *See* Wood v. Strickland, 420 U.S. 308 (1975).

223. *See* text at notes 253-76 *infra* for a discussion of why it may be appropriate nevertheless to retain some form of individual immunities.

224. A significant element of uncertainty is also introduced by the question raised by immunity doctrines of the degree of clarity and authoritativeness necessary to "clearly establish" a constitutional right. Is one district court decision enough? Is a decision by one panel of the governing court of appeals enough? *See* Procunier v. Naverette, 434 U.S. 555 (1978).

If the defendant is a municipality, and the actions complained of by the plaintiff constituted "official policy," then the plaintiff may be able to recover damages even though the constitutional status of the rights he claims were violated was previously unclear. *See* Owen v. City of Independence, 445 U.S. 622 (1980); note 250 *infra*. Damages may thus retain some deterrent power in these cases.

225. *See* Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979). *See also* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 497 (1955); *Developments*, *supra* note 3, at 1225-26.

226. *See Developments*, *supra* note 3, at 1218-19.

The most obvious, and easily resolved, example of these injuries may be presented by suits against officers who enforce unconstitutional statutes. *See, e.g.*, Tucker v. Maher, 497 F.2d 1309 (2d Cir.), *cert. denied*, 419 U.S. 997 (1974). In some of these cases, however, there may be grounds for placing responsibility on the individual officer because of his motivation in enforcing the unconstitutional law. *See, e.g.*, Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963).

brought by prisoners[227] and victims of police abuse — claims which, due to their number and range, have been particularly troubling to the courts.

A monetary award against the surrounding institution is also unlikely to be a particularly effective way of compelling the necessary changes. Damage actions can lead to systemic change, but this will occur, if at all, only through a process that is time-consuming, wasteful, and painful for both parties and the courts. Even with the potential, after *Monell v. Department of Social Services*[228] and *Owen v. City of Independence*,[229] of direct liability of local governments, a great many successful damage actions, perhaps including punitive awards, may be necessary to engender a cost sufficiently great to induce change that a local government is reluctant to institute of its own accord.[230] Equitable relief can achieve the same result — a result, we must remember, that is constitutionally required — more quickly and with less expenditure of everyone's time and money.[231] Equity deters specifically — through a clear message. Moreover, judges are aware that many of the institutional problems that give rise to the complaints that they hear are due in part to shortages of funds. Financial burdens may seem a poor justification for the deprivation of constitutional rights.[232] But, when funds are limited, it may make more sense to require that any available money be used directly to improve the conditions that caused the problems and promise to give rise to future wrongs, rather than to repay a particular victim who has had the resources and staying power to bring and win a lawsuit.

Third, the deterrent effect of damage suits is imprecise simply because we cannot even be certain who will ultimately pay. For example, when an individual is sued, the government will sometimes

227. The Fifth Circuit has held prison administrators vicariously liable for the acts of their employees. *See, e.g.*, Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975).

228. 436 U.S. 658 (1978).

229. 445 U.S. 622 (1980).

230. *See, e.g.*, Project, *supra* note 225, at 812-14 (attributing the failure of § 1983 suits to generate changes in police-department practices to the low visibility of the costs incurred, the disinclination of the employer to discipline individual policemen, and the municipality's lack of power to change police behavior). *Cf.* Carlson v. Green, 100 S. Ct. 1468, 1473 (1980) (*Bivens* remedy is recoverable against individuals and, therefore, is more effective deterrent than the Federal Tort Claims Act remedy against the United States).

231. An injunction, of course, functions only prospectively. Other forms of "equitable" relief, such as back-pay awards, may be retroactive, *see* Edelman v. Jordan, 415 U.S. 651 (1974), but, these aside, the threat of equitable relief offers little concrete incentive for adoption of procedures in order to *avoid* liability. *See* Owen v. City of Independence, 445 U.S. 622, 651-52 (1980); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (citing United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973). To the extent that that is undesirable — it may not be, *see* text at note 236 *infra* — damages, however blunt, may be necessary.

232. *See* Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970).

assume his liability.[233] That may be preferable in many instances,[234] but the ultimate source of the funds for the award is determined, not by federal rules designed to impose liability where it will best deter, but by the independent policies of local units. Moreover, insurance may play an unpredictable role in spreading the burden of liability. If section 1983 liability can be covered through insurance, the deterrent effect of damage remedies will be diluted. Of course, constitutional violations might be analogized to certain intentional torts and other behavior that is prohibited by law, so that section 1983 liability might not be an insurable loss.[235] That these questions are unresolved does little to stabilize the deterrent effect of section 1983 awards.

Equity avoids certain undesirable consequences that may accompany damage awards under section 1983. When the threat of damage liability does have a deterrent effect, perhaps because officials are averse to risk, it may cause government to be too cautious. There are occasions when official action should be prompted by considerations that run counter to nascent rights. At these times overcaution disserves the governed.[236] Likewise, the threat of damage awards against individual officials, to the extent that such awards deter other than egregious violations, may discourage conscientious persons from assuming office.[237] These are substantial costs that are not incurred by grants of equitable relief, for equity gives more specific instructions. Its commands are less likely to be either ignored, a response that is constitutionally impermissible, or exaggerated, a response that may dilute the effectiveness of local and state government.

Because equitable remedies influence behavior by directing future conduct, rather than by apportioning blame for past conduct, they should be available in situations where courts have been reluctant to find the defendant "responsible" in a traditional common-law sense.[238] Rather than dismissing the plaintiff's action for failure to prove "responsibility," courts could often profitably employ equitable relief to deter future wrongs. So understood, equity could prove a far more effective deterrent than it has been in the past, for it

233. *See* Yudof, *supra* note 10, at 1383-92.

234. *See* text at notes 253-76 *infra*.

235. Yudof, *supra* note 10, at 1387-88.

236. *See* Owen v. City of Independence, 445 U.S. 622, 665-66 (Powell, J., dissenting); Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974).

237. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 320 (1975).

238. *See* text at notes 179-214 *supra*.

would be freed of restrictions imposed by false analogies to tort. Of course, article III of the Constitution (which requires that a "case" or "controversy" exist between the parties to a suit if it is to be heard in federal court) and the terms of section 1983 itself (which describe the defendant as one who "subjects" the plaintiff to, "or causes [him] to be subjected" to the deprivation of a federal right) also require a connection between the defendant and the injury claimed by the plaintiff. I submit, however, that this connection can be much more attenuated in equity than in a suit for damages. The defendant in equity only need be "responsible" in the sense that he has the power to effect changes that will reduce future constitutional violations.

Although equitable relief is generally a better tool than damage relief for deterring constitutional torts, deterrence is not the only purpose of a damage award. The 1871 Congress gave virtually no indication of why it included a damage remedy in the predecessor of section 1983, but "an action at law" seems to have been included because it was viewed as the ordinary remedy for a deprivation of a right.[239] Traditionally, damage awards have been justified not only on deterrence grounds, but also on the grounds that they affirm the existence of the plaintiff's right, that they punish the defendant, and that they compensate the plaintiff.[240] Thus, determining whether equitable relief is a more appropriate remedy for constitutional torts than damages also requires an evaluation of both the extent to which each form of relief serves these additional functions and the importance of these functions in the section 1983 context.

Affirmation of the Plaintiff's Rights. Of the remaining three goals, the affirmation function of a section 1983 damages award is most significant, because it best justifies the existence of a federal action where a state tort remedy exists.[241] A damage award under section 1983 can serve as an assertion with bite that the federal government regards the right as important enough to merit federal protection.[242] But damages, as opposed to equitable relief, have not proven to be a significant vehicle for this sort of affirmation. A litigant cares most about getting a declaration of constitutional protection when the right that he is asserting has not yet been generally acknowledged by the courts, or has not been extended to the facts of his case. It is in

239. *See* Giles v. Harris, 189 U.S. 475, 485 (1903) (Holmes, J.). *Cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971) ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty").

240. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979).

241. *See* text at notes 102-04 *supra*.

242. *See* Love, *supra* note 91, at 1262.

precisely those cases, however, that the immunity doctrine of *Wood v. Strickland* and the limitations on vicarious liability will bar damage relief. *Wood*, for example, bars recovery in all cases in which the right has not been clearly defined prior to the defendant's conduct, unless the defendant has acted in bad faith. Where immunities are no bar to recovery, damage relief is still not a significant vehicle of affirmation, for *Carey* permits judges and juries to award only nominal damages for that purpose. Moreover, a damage award is not needed to emphasize the existence or importance of the plaintiff's right. Damages serve only as a formal token of the legal conclusion of the court. Equity can do the job just as well, for a declaration is all that is necessary, and it need not be hampered by limitations on recovery.

Punishment. Because it speaks to the future instead of the past, the equitable relief of a declaratory judgment or an injunction cannot perform the function of punishment as effectively as damages. Damages therefore should be available where punishment is important. But the number of cases in which punishment seems an appropriate goal of the relief granted under section 1983 is relatively small, for many of the most serious injuries are caused by systemic malfunctions. The Supreme Court has apparently adopted this view. Although it has not clearly approved punitive damage awards, it has indicated that such awards can be granted, if at all, only in the most egregious cases — where the defendant has acted "with a malicious intention to deprive [plaintiffs] of their rights or to do them other injury."[243] Damages seem appropriate in these cases not only because they fulfill a valid punishment function not served by equity, but also because they cause fewer undesirable consequences than do damage awards in nonegregious cases. Awarding damages in egregious cases is much less likely to cause overcaution on the part of state government or to discourage conscientious persons from assuming positions in state government.

Compensation. Compensation of the victims of constitutional

243. Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978). *See also* Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970); Caperci v. Huntoon, 397 F.2d 799 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968).

Punitive damages may be less acceptable when the defendant is a government entity, for the loss ultimately falls upon "innocent" taxpayers. *Compare* the Federal Tort Claims Act, 28 U.S.C. § 2674 (1976), which does not permit punitive damage awards against the United States, *with* Love, *supra* note 91, at 1277-78. The question of a municipality's liability for punitive damages under section 1983 is before the Court on review of City of Newport v. Fact Concerts, Inc., 626 F.2d 1060 (1st Cir. 1980), *cert. granted*, 101 S. Ct. 782 (1980).

tortfeasors is another function that injunctions and declaratory judgments cannot perform. But the courts have indicated that they are not willing to interpret section 1983 in such a way as to make it an effective vehicle for compensation; recovery turns not on the extent of the plaintiff's injury, but on his ability to navigate through the doctrinal jungle described above. Consequently, compensatory goals, to the extent that they are important, are best served by other forms of administration. Although the Court has endorsed the view that "the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by" these deprivations,[244] it has never suggested that section 1983 — or any other statute or rule — creates a general compensation system for all victims of unconstitutional state action.[245]

One could argue that, theoretically, compensation is an inadequate response to a constitutional wrong. The Constitution promises that government will not inflict certain injuries, not that it must purchase the right to inflict them.[246] Yet when compensatory goals are pursued in litigation under section 1983, the decisions of the courts indicate that we are far from committed to even the theoretically inadequate ideal of full compensation to victims of constitutional tortfeasors. Compensation is often not available, for limitations on vicarious liability[247] and the individual immunity doctrines[248] bar recovery in many cases. These barriers come into play in some cases where there is no question that the plaintiff has suffered a constitutional injury. Yet, the plaintiff is not compensated because the court feels that the defendant should not be made to

244. Carey v. Piphus, 435 U.S. 247, 254 (1978). *But see* G. WHITE, TORT LAW IN AMERICA 62 (1980), which argues that

> tort actions, prior to 1900, had not principally been conceived as devices for compensating injured persons. Compensation had been a consequence of a successful tort action, but the primary function of tort liability had been seen as one of punishing or deterring blameworthy civil conduct. A conception of tort law as a "compensation system" is a distinctly twentieth-century phenomenon, brought about by an altered view of the social consequences of injuries [and the existence of liability insurance].

In addition, *see id.* at 147, 178.

245. The reluctance of courts to impose liability in cases that are described as resting on doctrines of negligence or strict liability is one manifestation of the view that a "compensation system" for victims of constitutional wrongs is inappropriate. *See* text at notes 208-14 *supra*.

246. Owen v. City of Independence, 445 U.S. 622, 650-51 (1980).

There are occasions where the Constitution allows otherwise-prohibited actions if the state is willing to pay a cost, but in those cases the cost is specified in the Constitution, or by implication from it. For instance, the state can deprive a citizen of life, liberty or property if it complies with due process; land can be condemned if just compensation is paid; and the confession of a suspect can be used against him if he has been given the *Miranda* warnings and waived his rights.

247. *See* Monell v. Department of Social Servs., 436 U.S. 658, 691-94 (1978).

248. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975).

pay.[249] Thus, compensation for the injured plaintiff turns not on the extent of his need for relief but on the doctrinal status of the right he asserts or the position, wealth, and state of mind of the official to whom he can trace the deprivation.[250] And even when these barriers are crossed, *Carey v. Piphus*[251] defines the harms for which compensation is to be awarded narrowly to exclude dignitary injuries.

The judicial imposition of damages against defendants is not the only method by which to compensate victims of constitutional deprivations at the hands of state officials. Ironically, in the context of the more traditional tort injuries, judicial administration of compensation for victims has also come under attack.[252] When compensation is sought for serious, tangible injuries — of the sort caused, say, by automobile accidents — we are coming to believe that the pace and vicissitudes of litigation are unnecessarily cruel. This results, in part, because we take seriously the goal of full compensation for such injuries. Where full compensation is taken seriously, the courts' special capacities — to face hard questions of culpability, to trace cause and effect, and to articulate and promote values — become less relevant. Common-law adjudication delays and distorts the process of compensating those who suffer physical injuries. Because we have become increasingly sensitive to the injustice of requiring tort victims to bear the cost of this process of articulation, however useful it may be to society as a whole, we have begun to adopt alternative methods of administering compensation for such victims. These alternatives are designed to give more predictable and more immediate compensation for obvious and easily measurable physical injuries.

In constitutional litigation, by contrast, we appear to be less committed to compensating every person who suffers a deprivation of a constitutional right at the hands of a state official. We are more committed in constitutional litigation than in a common-law tort litigation to the deterrence of certain conduct and to using the skills of courts to articulate society's values.

Where we really care about compensation of the victims of constitutional torts, claims might most appropriately be handled admin-

249. *See* text at notes 179-87 *supra*.

250. Where there is "official policy or custom" of a local government, these limitations can be avoided. *See* Owen v. City of Independence, 445 U.S. 622 (1980). It remains to be seen how effective this route will be for victims seeking compensation; it is not open to victims of *state* action, for § 1983 has been interpreted as not providing a cause of action against a state, as distinct from state officers. Quern v. Jordan, 440 U.S. 332 (1979).

251. 435 U.S. 247 (1978).

252. *See, e.g.*, J. O'CONNELL, THE LAWSUIT LOTTERY (1979).

istratively — perhaps through state systems, under scrutiny and review by the federal courts. In many cases in which a section 1983 plaintiff seeks damage relief, exhaustion of state remedies — or limitation of recovery to recovery under state systems — may be appropriate. At the same time, the equity powers of the federal courts should be available without any exhaustion requirement. This would enable courts to continue the process of articulating important rights and deterring violations of such rights under section 1983.

B. *Limiting Damages Against Individual Defendants*

Since long before the passage of section 1983, it has been lawyers' lore that a damage award is a "normal" remedy for a deprivation of rights.[253] As we have seen, however, equitable relief under section 1983 may be a better tool for deterring constitutional violations than damage relief. And deterrence is an especially important goal of section 1983 actions. But, in most cases where damages can serve important functions not served by equity, there are compelling reasons for preferring that damage awards be imposed against government entities rather than against individual defendants.

The single general exception to this rule in damage cases should be the case in which the individual defendant has acted egregiously — perhaps, when he has violated a clear constitutional right of the plaintiff or has acted in subjective bad faith. In other situations, allowing damages against individual defendants can only rarely be justified. I have described above the ineffective way in which damages promote deterrence, especially in suits against individuals. A damage suit against an individual is not necessary to obtain a vindication of a plaintiff's right. And, where compensation is important, it will be a very rare case in which an individual defendant is a more significant source of funds than the surrounding governmental institution. Indeed, the individual defendant, who is typically uninsured against such liability, will often be unable to meet a substantial damage award; the government entity will be the only source of sufficient funds to compensate the plaintiff.

In this section, I elaborate on two additional reasons why damage awards against individual officers who have not acted egregiously are particularly inappropriate. First, such awards imply a culpability that is not appropriately placed upon an individual defendant who in effect serves only as a stand-in for a state or local government. Second, constitutional deprivations that are traceable under

253. *See, e.g.*, Katz, *supra* note 103, at 17-18.

traditional notions of responsibility to the acts of an individual defendant very often are attributable largely to systemic flaws within the surrounding governmental institution. The systemic origin of many constitutional injuries makes the attribution of culpability to an individual defendant particularly inappropriate.

Damage awards against individual defendants under section 1983 presume a culpability or responsibility on the part of the defendant that does not fit neatly into cases where the real conflict is a constitutional dispute between governments. The terms of section 1983 define a lawsuit in which the federal government, whose protection is claimed by the plaintiff, confronts the state, under color of whose laws the defendant acts. When the relief sought is damages, however, we have seen that there is a strong analogy to common-law tort.[254] The tension between section 1983 and the tort model arises because, as conceived in traditional terms, a damage action posits two *individual* adversaries, an alleged wrongdoer and his victim. A successful damage action is based on the conclusion that there is some reason to require *this* defendant to pay money to *this* plaintiff. In other words, the structure of the suit presumes some sort of personal and culpable responsibility on the part of the defendant for the plaintiff's injury.

The attribution of culpability implicit in the tort model has been reinforced by certain unrelated developments in federal jurisprudence. *Ex Parte Young*[255] adopted for equity cases the fiction that an official who "subjects" another to the deprivation of a constitutional right is acting as an individual tortfeasor. This allowed the Court to avoid the eleventh amendment bar to federal jurisdiction,[256] and since *Young* most suits challenging state action have been brought against named individuals. The same pattern existed in damage actions until *Monell v. New York Department of Social Services*[257] overruled *Monroe*'s conclusion that a local government, although not protected by the eleventh amendment, was not a "per-

254. *See* Carey v. Piphus, 435 U.S. 247, 256-57 (1978). *Cf.* Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEXAS L. REV. 1307, 1352 (1979) (discussing the application of individualistic notions of intent in discrimination cases involving group-oriented actions).

255. 209 U.S. 123 (1908).

256. The eleventh amendment provides that states and their agencies cannot be sued in federal court. *Young* permitted prospective injunctive relief in a suit where a state official, rather than the state itself, was the named defendant. When the relief sought is state money or property, the fiction cannot be as easily maintained, and suit is barred in the absence of a waiver of the amendment's immunity. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Edelman v. Jordan, 415 U.S. 651 (1974); Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

257. 436 U.S. 658 (1978).

son" subject to liability within the language of section 1983. There is danger that this emphasis on the individual defendant, which originated in fiction and convenience, will be taken too seriously. At least where the litigation receives a great deal of publicity, the public, less proficient in the subtleties of constitutional litigation, may perceive the defendant official as a wrongdoer who has committed a particularly offensive act (one, after all, that is sufficiently odious to be barred by the Constitution), rather than as a stand-in for his government employer.

A misapprehension as to culpability may also exist where the defendant is a government entity.[258] But, if damages are thought to be necessary, they are more appropriately awarded against an entity than against an individual, for the burdens they impose on an entity are somewhat less onerous. It is easier, when the defendant is an institution rather than an individual, for court, parties, and public to view the conflict as intergovernmental, and, where that is appropriate, to stress the systemic origins of unconstitutional conduct. Moreover, a damage award against a governmental entity can be viewed as a judicially implemented general compensation scheme, for the effect of the award, at least theoretically, is to spread part of the costs of constitutional injuries among the citizens who pay taxes.[259]

The tort analogy in a section 1983 suit against an individual may so distract a court that it will deny recovery in an otherwise meritorious case because it perceives the burden of an adverse award on the defendant to be disproportionate to his actions. This is most dramatically demonstrated in the suggestions that, as part of his cause of action, a section 1983 plaintiff must prove that the defendant acted intentionally or recklessly to deprive the plaintiff of constitutional

258. These suits are possible after Monell v. Department of Social Servs., 436 U.S. 658 (1978). The Court has applied concepts of blame and responsibility to institutional defendants through its requirement that the challenged conduct be attributable to "official" policy or custom. *See* Owen v. City of Independence, 445 U.S. 622, 655 n.39 (1980). This definition of institutional responsibility has yet to be refined through extensive application, but it is unlikely to encompass all systemic flaws. Instead, the introduction of these concepts appears to be another example of the distracting power of the tort analogy.

When combined with the holding of Bishop v. Wood, 426 U.S. 341 (1976), the scope of liability for "official policy or custom" may be narrow indeed. In *Bishop*, plaintiff's "property" interest in his job as a city policeman was defined with reference to the municipal ordinance governing discharges. The Court held that, under the admittedly ambiguous terms of the ordinance, plaintiff had no constitutionally protected "property" interest that would trigger a hearing requirement. Thus, while departures from official policy cannot be the basis for suit under *Monell*, compliance with official policy may mean that plaintiff has not been deprived of a protected interest. This dilemma was avoided in *Owen* because plaintiff's discharge was coupled with allegedly false and defamatory charges that implicated a "liberty" interest. *See* 445 U.S. at 633-34 n.13.

259. *See* Owen v. City of Independence, 445 U.S. 622, 655 (1980).

rights.[260] In this context, the strained fit of the analogy to tort becomes quite apparent, for the courts are struggling to define a basis of liability in common-law terms: Is "negligent" conduct enough to support a cause of action? Can a defendant be held "strictly liable"?

Certain constitutional provisions, by their terms or by interpretation, define individual rights with reference to the state-of-mind of government actors.[261] For example, the fourth amendment prohibits only "unreasonable" searches and seizures, and the equal protection clause of the fourteenth amendment has been interpreted to bar only intentional discrimination by the government.[262] Other provisions — the due process clause, the eighth amendment — impose more absolute restrictions on actions and consequences. A plaintiff may be deprived of a constitutional right protected by one of these latter clauses even though no one can be said to be "at fault" in the sense made familiar by the common law.[263]

The attempt to require all section 1983 plaintiffs to prove state-of-mind or fault is misguided. In damage cases, such a standard is not an accurate means of determining which defendants should be held liable. Even in the traditional tort context, courts and commentators have become increasingly uncomfortable with predicating liability on determinations of individual fault. Conduct that could be called unreasonable and thus found blameworthy under established notions of fault, we now realize, is often the result of a trivial error or slip of judgment of the sort to which we all fall victim at many times.[264]

Individual fault is an even less appropriate tool for deciding how to distribute losses when the parties, although contesting a sum of money that one seeks to recover from the other, serve as stand-ins for governments. The harm to the plaintiff may, in a symbolic sense, be more serious because it comes from the government. But the injustice of requiring an individual defendant to pay is also greater. Even if he is "at fault" in some traditional sense, the harm that he has caused is augmented by the power of the state, which implies a

260. *See* note 210 *supra*.

261. Baker v. McCollan, 443 U.S. 137, 140 n.1 (1979). Justice Rehnquist's opinion also suggests, somewhat cryptically, that any additional state-of-mind requirement derived from § 1983 may vary according to the "constitutional violation[] which might be the subject of [the] action." 443 U.S. at 139-40.

262. *See* Washington v. Davis, 426 U.S. 229 (1976).

263. *See* Newman, *supra* note 10, at 461 n.59.

264. The Court's conclusion that something in addition to the deprivation of a clear constitutional right is necessary to justify punitive damages, *see* note 243 *supra* and accompanying text, may be seen as one effort to accommodate that perception.

broader responsibility.[265] This augmentation occurs even where the official has used his power in a way that the state has not intended or condoned, for the state's authority has given the official special power to harm.[266] On occasion, of course, the individual has acted in deliberate and malicious disregard of a citizen's rights. In such a situation, it is easy and appropriate to impose liability on him. But most cases are much more difficult; in these cases the burdens accompanying a damage award seem much more appropriately placed upon the government entity than upon the individual official.

Awarding damages against government entities rather than individual defendants is preferable for a third reason that was alluded to in the earlier discussion of the deterrent effect of damages. One reason why the tort analogy causes such strain in the constitutional context is that governments act through institutions, and constitutional injuries are often due to systemic problems within these institutions. This is particularly true of constitutional injuries to prisoners and to others in police custody. These cases are particularly troubling because an individual police officer, prison guard, or warden — one who might appear most responsible for a constitutional deprivation — works under extremely difficult conditions.[267] He deals every day with a large number of individuals, many of whom are prone to violent and provocative behavior. He may be underpaid, overworked, and just plain tired. Many of his mistakes may be caused by forces for which he cannot be held personally accountable — lack of education, training, personnel and equipment; and absence of public support. Even an overreaction in fear and anger is something that we, as human beings, can understand, if not approve. Although the Constitution says that it is not acceptable for a government official to deprive a citizen of a constitutional right, it is inevitable that deprivations will occur, even when all officials are persons of good will.[268] It may be more appropriate to think of the Constitution as creating a right to live in a society that seeks to minimize certain defined injuries through systemic safeguards, rather than as creating rights to be

265. *See, e.g.*, Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979); Jenkins v. Meyers, 338 F. Supp. 383 (N.D. Ill. 1972), *aff'd. en banc*, 481 F.2d 1406 (7th Cir. 1973).

266. *See* note 144 *supra*.

267. Justice Rehnquist articulated his sensitivity to these problems in Bell v. Wolfish, 441 U.S. 520, 540, 546-51 (1979). Unfortunately, as articulated in *Bell* ("the considered judgment of these experts [the corrections officials] must control," 441 U.S. at 551), his concerns portend a blanket justification for official action, and an exemption from constitutional restrictions, rather than a precise attention to right and remedy.

268. The discussion of *Martinez v. California* in note 146 *supra*, argues that erroneous decisions, many of which will impose great costs on citizens, are inevitable. The terms of the due process clause, unlike, for example, those of the fourth amendment, tolerate those mistakes.

completely free from injury.[269] Compensation for the inevitable victims may be appropriate, but it is not clear that the tort device of personal liability is an appropriate means for distributing funds in this setting.

The case of *Whirl v. Kern*[270] provides a useful illustration. Because of a slip-up in communications between the office of the district clerk and the office of the county sheriff, the plaintiff was incarcerated for nine months after all charges against him were dismissed.[271] He brought suit for damages against the county sheriff. Judge Goldberg, for the Fifth Circuit, held that the sheriff could be liable under Texas false imprisonment law and under section 1983 despite the plaintiff's failure to prove that the sheriff had acted with any improper motive. *Whirl*'s conclusion that a defendant can be held liable whenever a constitutional deprivation has occurred, whatever his state of mind, has not survived in the Fifth Circuit. In *Bryan v. Jones*,[272] another damage action against a sheriff for failure to release because of administrative error, the court reiterated its view that there is no state-of-mind requirement for a prima-facie case,[273] but held that good faith can be a defense to a section 1983 action. In this pair of cases we see the court struggling with the tension between its awareness that a plaintiff has been greviously injured and its reluctance to place the burden of redress on the defendant.[274] The plaintiff was deprived of his liberty without due process of law, but the deprivation apparently was caused by an unfortunate slip of the bureaucracy, rather than by the individual official.[275]

In arguing that it may be inappropriate to grant damage relief against the official named as defendant in cases such as *Whirl*, I do

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269. *See* note 197 *supra* and accompanying text.

270. 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).

271. *See also* Baker v. McCollan, 443 U.S. 137 (1979). In *Baker*, the plaintiff was arrested pursuant to a warrant issued in his name. The warrant was based on a prior arrest of plaintiff's brother, who had used a duplicate of plaintiff's driver's license for identification. Plaintiff was detained for several days before the error was discovered. He brought a "[§] 1983 false imprisonment action," which was rejected by the Supreme Court on the grounds that, absent an attack on the warrant, plaintiff had alleged nothing that would amount to a deprivation without due process. The Court did not reach the question of responsibility because there was no violation of the Constitution.

272. 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976).

273. The court did require a showing of intent to confine the plaintiff, an aspect of false imprisonment law that was imported, improperly, into the § 1983 case.

274. The jury in *Bryan* awarded plaintiff $40,000 against the defendant sheriff.

275. The Court of Appeals, remanding for a new trial, did note that the sheriff would be liable if it could be shown that "he negligently establishe[d] a record keeping system in which errors of this kind are likely." 530 F.2d at 1215.

not mean to suggest that constitutional violations that result from systemic causes should be tolerated. We have seen that damage awards — even against an implicated government entity — are less effective than equitable relief in curing systemic problems. And the analogy to tort law may distract the courts from devising workable remedies for very real constitutional wrongs by focusing attention on the defendant's conduct, rather than on possible systemic changes to minimize future injury. But where damages are to be assessed in response to a constitutional deprivation, it is generally preferable — to ensure adequate compensation and to reduce the distracting power of the tort analogy — that they be assessed against the governmental entity rather than against the individual official. Of course, even when courts view institutional liability for damages as an appropriate response to constitutional deprivations resulting from systemic harms, there are still good reasons to be cautious. For one thing, the confrontation between an individual plaintiff and an institutional defendant may exaggerate, in the eyes of the jury and the public, the injury done to the individual in contrast to the defendant's apparently inexhaustible resources and lack of human sympathy.[276] Nevertheless, these sorts of concerns are less troublesome than those created by awarding damages against individual officials.

C. *Suggestions for Approach*

The difficulty with damage remedies under section 1983 stems, as we have seen, from two related problems. First, damage awards generally neither deter constitutional violations nor affirm constitutional rights as effectively as equitable relief. Equitable relief can involve a clear and specific command, whereas damage relief only imposes costs on unconstitutional behavior. Also, because equitable relief does not implicate many of the undesirable consequences associated with damage awards, it can be used to deter future constitutional violations in situations where damages seem inappropriate.

276. Another, similar, cost is inherent in the case-by-case focus of damage litigation, whether the defendant is institutional or individual. The focus on a specific wrong suffered by a specific plaintiff may capture the attention of the public and the courts in a way that distorts the merits of the controversy. We know from common-law litigation that injuries to identified individuals have an emotional impact that calls for dramatic, but not necessarily effective or proportionate, action. However, it is the responsibility of the courts, in adjudicating constitutional issues, to evaluate the propriety of restraints on government action in the light of political and financial realities. The Court has done this explicitly. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979); Ingraham v. Wright, 430 U.S. 651 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). This evaluation of constitutional responsibilities is most fairly done in a setting where the trade-offs that must be made by a government official with a finite budget and infinite demands can be discussed without creating an erroneous impression of judicial callousness to a specific individual's suffering.

The second problem with the provision for damage awards under section 1983 is that, except in egregious cases, damages against individual defendants seem unjust; the burdens associated with damage liability under the statute are more appropriately placed upon the surrounding governmental entity than upon the individual defendant.

As we have seen, courts and many commentators are ambivalent about damage awards under section 1983. However, this ambivalence has not given rise to doctrines that adequately respond to the actual problems created by such awards. Both groups have failed to separate questions concerning violation of the statute from questions concerning appropriate relief for violations. Because courts and commentators have sometimes translated ambivalence about damages into ambivalence about section 1983, they have devised doctrines that dispose in wholesale fashion of many section 1983 actions. They have failed to consider adequately whether equitable relief might appropriately be awarded in some cases where damages are inappropriate. And they have failed to distinguish between those cases in which damage awards are acceptable and those cases in which damage awards are unacceptable.

It is important in answering these questions that courts consider separately whether the plaintiff has established a cause of action under the statute and whether the relief sought is appropriate. In deciding whether the plaintiff has established a violation of the Constitution remediable under section 1983, courts should be wary of common-law tort doctrine concerning responsibility — for example, principles of causation and fault. Equitable relief is often appropriately awarded under the statute to deter future constitutional violations and to affirm the existence of the plaintiff's right, even where damage awards, with their implicit reference to tort notions of responsibility, would be inappropriate. Only after a court has determined that the plaintiff has established a violation of the Constitution, including the requisite "state action," should traditional questions of responsibility arise. These questions go to the proper form of relief — is it fair to require the defendant to pay damages?

Immunity doctrine may provide fertile ground for the development of more flexible doctrine concerning damage relief. It is in the immunity cases that the courts have addressed their fears about damage liability most directly. In those cases, the courts have recognized that situations exist in which the plaintiff can establish a constitutional deprivation but that, nevertheless, a damage award is not

appropriate. Questions of immunity arise after a finding of liability has been made; they are addressed to the question whether it is appropriate to require the defendant to pay.

Immunities, as they have been developed, are not derived from the Constitution. Nor are they tethered to clear statutory moorings. Immunities are judge-made exemptions that the Supreme Court has formally justified by its interpolation of what the 1871 legislators "must have meant" given their knowledge of the common law, which presumably set out the ground rules for disputes between individuals.[277] On its face, this justification seems absurd; in enacting section 1983, Congress obviously intended that government officials would, on occasion, be subject to damage liability[278] despite their customary protection by the common law.[279] Nevertheless, some immunity limitations on damages recovery can be reconciled with the overriding purposes of section 1983. These limitations can be justified only if they are not drawn unthinkingly from the common law, but are responsive to particular problems raised by personal or institutional liability in damages for constitutional wrongs.

The cases concerning executive immunity, if not legislative and judicial immunities,[280] develop, in a tentative fashion, the concerns about the propriety of damage relief discussed above. It is suits against the executive officers who enforce the decisions of the legislature and the courts that have been the vehicles for challenges to the constitutionality of statutes and common law.[281] I would argue that

277. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 316-18 (1975); Pierson v. Ray, 386 U.S. 547, 554 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

278. *See* Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941, 970 (1977).

279. *See* Mr. Lowe's remarks in favor of the 1871 Act: "[t]he local administrations have been found inadequate or unwilling to apply the proper corrective. . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871), *quoted in* Monroe v. Pape, 365 U.S. 167, 175 (1961).

280. Special problems are involved in actions against legislators, *see* Tenney v. Brandhove, 341 U.S. 367, 373 (1951) (granting an absolute immunity to members of a state legislative committee, and referring to the federal speech and debate clause, art. I, § 6 of the United States Constitution, as reflecting "political principles already firmly established in the States"), and perhaps in those against judges, *see* Pierson v. Ray, 386 U.S. 547, 554 (1967) (established absolute immunity for judicial acts "within the judicial role"). The common-law principles governing judicial immunity are less clear than those establishing legislative immunity, *see Developments*, *supra* note 3, at 1201-02, and the legislative history indicating that Congress intended to hold judges liable is more clear than the history with regard to legislators' liability. *See* Pierson v. Ray, 386 U.S. at 559-63 (Douglas, J., dissenting).

Legislative and judicial immunities, unlike executive immunities, have been applied in suits in equity as well as in damage actions. *See* Supreme Court v. Consumers Union, 100 S. Ct. 1967 (1980).

281. This practice exacerbates the problems described in text at notes 253-76 *supra*.

the courts should be even more explicit in addressing the propriety of damages in executive immunity cases. A violation of the Constitution and the participation of the state should be sufficient to establish a case under section 1983, without further inquiry into fault or blameworthiness. The defendant in equity should only have to be "responsible" in the sense that he has the power to effect changes that will reduce future constitutional violations. Damages, however, may be inappropriate because traditional views about responsibility are implicated by that form of relief.

It is inappropriate to require a proof of fault or a specific state-of-mind as part of the plaintiff's case. But, in deciding whether to award *damages* against an individual defendant the court can appropriately inquire into the defendant's state-of-mind. Many courts have exhibited a reluctance to award any relief against an individual official who has acted negligently but not intentionally.[282] Negligence, developed at common law with reference to the ambiguous standard of the reasonably prudent man, has seemed to them to be a capricious guide for official conduct. This view, however, reflects a failure to perceive that in section 1983 cases the standard of behavior comes from the Constitution, not from assessing the conduct of a hypothetical character. That the defendant made a reasonable mistake does not mean that there has been no constitutional deprivation; it means only that it is harsh to hold him for damages.

The standard articulated by the Court in *Wood v. Strickland*[283] responds to this perception by permitting damage awards against individual defendants only for particularly egregious conduct — something more than a trivial mistake in judgment or a giving way to institutional pressures. *Wood* was a suit brought against school board members and school administrators for an allegedly unconstitutional expulsion from a public high school. Plaintiffs were charged with "spiking" the punch at an extracurricular meeting, in violation of a school regulation. They argued that their expulsion did not comply with the requirements of procedural due process. The Court said that

> [i]n the specific context of school discipline, . . . a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights

282. *See, e.g.*, Ronnei v. Butler, 597 F.2d 564 (8th Cir. 1979); Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979). *But see* Howell v. Cataldi, 464 F.2d 272, 279 (3d Cir. 1972); Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971), *addendum* 456 F.2d 834 (5th Cir. 1972), *cert. denied*, 404 U.S. 866 (1971); Madison v. Manter, 441 F.2d 537 (1st Cir. 1971).

283. 420 U.S. 308 (1975).

> of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[284]

This formulation directs a court's attention to proper questions of individual responsibility rather than asking it to posit how a hypothetical "reasonably prudent official" would act under the circumstances. *Wood* requires a state official to know and respect established rights. Negligent failure to inform one's self of the limits of one's powers will not relieve a defendant of liability.[285] *Wood* does not address, except by negative implication, whether other forms of negligence[286] will receive more sympathetic treatment.

The *Wood* standard does not perfectly reflect those situations in which it is fair to hold an individual official liable for damages under section 1983. First, there will be instances in which the constitutional right asserted has not been established by case law but the official conduct is so shocking that the culpability of the defendant is manifest.[287] Second, there will be cases in which the defendant may have failed to perform a clear obligation of which he was fully aware, but his failure nevertheless so lacks culpability that he should not be held liable. *Whirl v. Kern*, the suit against the sheriff whose prisoner was held beyond his term due to an administrative mix-up, may be an example of such a case.[288]

The *Wood* formulation, therefore, should be the beginning rather than the end of discussion. Sensitively applied, it may be an effective vehicle for inquiry into questions of responsibility and appropriate relief against individual defendants.

Where the defendant is a government entity such as a municipality or a school board, the kind of responsibility that supports an award of damages is properly defined more loosely than when the defendant is an individual. A damage judgment against an entity

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284. 420 U.S. at 322. *But see* note 114 *supra*.

285. *See* Yudof, *supra* note 10, at 1330-33; Kattan, *supra* note 278, at 946 n.26.

286. The defendant may be aware of a constitutional standard but negligently fail to conform to it. He may be negligent, for example, in determining that probable cause exists.

287. Strip searches of minor traffic offenders may fall into this category. *See* Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (per curiam).

Presumably, the "bad faith" prong of the *Wood* test encompasses cases of this sort, and damages could be recovered if the court decides that the plaintiff has indeed been deprived of constitutional rights.

288. *See* text at notes 270-75 *supra*.

supported by public taxes leads to spreading, rather than mere shifting, of the costs of injuries[289] — although any given institution may be limited in its ability to absorb and pass on these costs. Also, many constitutional violations that appear to result from individual wrongs are best attributed to systemic failings within government institutions. Where the individual has not acted egregiously, we should hold the institution rather than the individual responsible for these deprivations.

The Supreme Court has recognized that the immunity doctrines that protect individuals should not be applied when the defendant is a government body.[290] However, in the *Monell* case the Court suggested that a municipality would not be liable unless the plaintiff could point to an official policy or custom that violated the Constitution.[291] The Court described this showing as an essential part of the plaintiff's case. Because this limitation on liability appears to be an effort to articulate a standard of responsibility for past behavior, akin to the individual immunity doctrine discussed above, it is appropriate only in regard to damage awards, for only that form of relief implicates concepts of responsibility. Equitable relief should be available even where no official policy or custom exists. Moreover, even as a limitation upon damage relief, *Monell*'s reference to "official policy or custom" may be interpreted too narrowly to give a proper account of institutional responsibility.[292] Damages against a government body are appropriately awarded to redress systemic failings (perhaps under the rubric "custom"), even when those failings lead, as in *Whirl*, to only isolated deprivations of constitutional rights.

CONCLUSION: THOUGHTS ON EXHAUSTION

It is a common misperception that ambivalence about section 1983 damage actions arises from the overlap with the states' common law of tort. This ambivalence arises instead from two quite separate problems. The first of these has its source in the concern that the Constitution has been asked to do too much. Section 1983 is implicated only because it is one vehicle of expanding constitutional rights. The second problem is specific to damage actions under section 1983. A damage remedy does not fit easily into constitutional

289. *See* Owen v. City of Independence, 445 U.S. 622, 655 (1980).

290. *See* Owen v. City of Independence, 445 U.S. at 655-56.

291. *See* 436 U.S. at 690-91.

292. *See* note 258 *supra*.

litigation, especially where the defendant is an individual state official who has not acted egregiously. These problems are distinct, but it is no coincidence that they simultaneously have grown in urgency over the past two decades. As constitutional protection has expanded to encompass more rights — including rights to be free from the amorphous but often crushing harms that are caused by institutions rather than individual actors — it has become increasingly difficult to accept the imputation of responsibility to the defendant that is implicit in tort relief. Some of the hesitation about expanding the scope of the Constitution to reach institutional practices should be relieved by adopting forms of relief that do not rely on concepts of responsibility.

Many of the suggestions for resolving the problems created by section 1983 are directed toward the false issue of redundant relief. The most common example is the suggestion that all section 1983 plaintiffs, like state prisoners in habeas corpus cases, be required to exhaust state judicial or administrative remedies.[293] The goal of this proposal is to reduce the supplementary role of section 1983 by giving primary jurisdiction to state courts; federal courts would provide relief only where state courts have failed.[294]

The plea for an exhaustion requirement is most often made in the context of claims by prisoners against their keepers or prosecutors.[295] Yet if there is any current situation which parallels that addressed by Congress in 1871, it is found in our prisons. There are conditions of danger and violence within local jails and state prisons that government and institutional officials are even more unwilling or unable to correct than were Southern officials faced with the nineteenth-century Klan.[296] And a prisoner may be in an even more vulnerable position than a black man in the post-War South, for he has no freedom of movement whatsoever, no legal means of escape. Nor are prisoners represented in the running of the institution or in the func-

293. *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971) (Burger, C.J., dissenting); Note, *supra* note 10, at 1498-501. The argument for exhaustion has been made most forcefully when the state remedies to be consulted are administrative. *See, e.g.*, H. FRIENDLY, *supra* note 107, at 100-01.

294. A general judicial-exhaustion requirement should call for modification of the general rule that would make a state judgment conclusive on the parties. *See Developments*, *supra* note 3, at 1331-54.

295. *Cf.* PRISONER CIVIL RIGHTS COMMITTEE, FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS (1980) (burden of prisoner conditions-of-confinement cases has fallen disproportionately upon the federal judiciary).

296. *See, e.g.*, R. GOLDFARB, JAILS: THE ULTIMATE GHETTO (1975); J. MITFORD, KIND AND USUAL PUNISHMENT (1973).

tioning of institutional tribunals; representation would give some assurance that administrative processes were responsive to prisoner needs. Unlike other institutions, which may be expected to reflect, to at least some degree, the interests of all participants, we make no pretense that prison officials regard the prisoners as their constituents.

Justice Douglas discerned in section 1983 a congressional intent to free plaintiffs from the need to demonstrate the inadequacy of alternative remedies. In the context of a prisoner's complaint, this makes a great deal of sense. Prisoners often lack financial resources that may be necessary to meet that burden of proof, and they are not ordinarily able to gather the information necessary to establish that administrative remedies are inadequate. Moreover, it is not implausible to suppose that there will be cases (perhaps when constitutional rights are most in danger) of unofficial sanctions for filing grievances,[297] where immediate federal involvement is necessary to protect a prisoner from retaliation or pressure to drop his claim.[298]

An exhaustion requirement applicable to all cases brought under section 1983, in equity as well as for damages, cannot be justified in any context. The redundancy of relief is, in itself, neither an important nor a legitimate source of the unease about section 1983 actions. And a general exhaustion requirement would eliminate few of the actual problems associated with such actions. It would do little to reduce the proportion of frivolous claims that would reach the federal courts, for although it might mean that many civil-rights cases would never reach the federal courts, there is no guarantee that the cases unlitigated would be the most insubstantial. An exhaustion requirement might also exacerbate state-federal tensions by diverting federal caseload to already burdened state courts and by requiring federal courts to inquire whether state courts should have been more responsive to a plaintiff's request. Most important, it would destroy the symbolic role played by the federal courts in affirming strong national support for citizens' rights.

There are no all-encompassing answers to the competing concerns created by section 1983 litigation. Nevertheless, I can make some general suggestions that respond to the problems outlined in this Article. First, we have seen that, in part because of the cause of action provided by section 1983, the expansion of constitutional rights to encompass previously unprotected interests entails substan-

297. *See* Fiss, *supra* note 88, at 19-20.

298. *But see* Ingraham v. Wright, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting); Kimbrough v. O'Neil, 523 F.2d 1057 (7th Cir. 1975), *aff'd. en banc*, 545 F.2d 1059 (7th Cir. 1976).

tial costs; it contributes to the burgeoning caseload of the federal courts and to the displacement of state lawmaking authority. The appropriate response to these problems, however, is not to attempt to discourage actions under section 1983 or to ignore the commands of the Constitution. Constitutional rights are implicated. Federal remedies are needed. There is no principled way to remove from the federal courts the burden of seeing that constitutional minimums are met. The existence of the costs that accompany expansion of constitutional protections only warrants caution in interpreting the scope of those protections.

We have also seen that damage relief is generally inappropriate in a constitutional setting. Piecemeal litigation of individual claims for damages is a glaringly inadequate response to the serious problems of many state institutions, including the prisons. Litigation of this sort is likely to be an ineffective instrument of change because it places serious burdens on individual plaintiffs and overloads the federal courts without addressing the institution's underlying problems. Because systemic problems — often caused by lack of financial resources — are at the root of many of the constitutional wrongs that occur in many institutions, damage litigation is ineffective, unfair, and counterproductive. Equitable relief, especially that sought in a class action, is more responsive and more likely to minimize unconstitutional conduct.

This is not to say that individual claims for compensation should be ignored. But they should be handled administratively, through state systems that can be scrutinized and corrected by the federal courts; the equity powers of these courts should be available without any exhaustion requirement to correct any systemic malfunctions. Such a diversion of claims for damages to state bureaucracies could bring about a dramatic decrease in litigation[299] while focusing the federal judiciary's attention on the most basic institutional problems.

We have also seen that, to the extent that section 1983 plaintiffs must be compensated through judicial awards of damages, it is generally more appropriate to assess those awards against government entities than against individual officers. First, individual officers rarely provide a source of funds that could not be obtained from a government entity. In addition, the burdens that accompany a damage award under section 1983 are substantial; it appears unjust to impose them upon an individual who has not acted egregiously.

299. *See* Turner, *supra* note 118, at 623-24 ("[A] substantial majority of prisoner cases seek money damages").

This is especially true in the section 1983 context because many constitutional deprivations that can be traced to individual wrongs under traditional standards of responsibility are actually caused by systemic malfunctions within governmental institutions. Assessing damages against the implicated governmental entity for these systemic harms at least leads to a spreading of much of the financial cost involved.

Much of this Article has been occupied with the reasons why courts fail to act. But the thesis presented here should free the courts for action. The debate over section 1983 has been polarized unnecessarily. The statute has come to represent for many judges the destruction of the states, not to mention the federal judiciary. Advocates of individual rights often view it as a panacea. Each side frightens the other. But we do not need to develop over-arching doctrine to lock the gate and keep back the flood. Vindicating reputation also does not require the equivalent of a no-fault compensation system.[300] Recognizing that the government is responsible for mistakes, and can be asked to minimize them, does not require compensation for every injury.[301]

Congress, in 1871, committed the federal courts to the protection of individual victims of state action. Justice Douglas expanded our earlier understanding of that protection at a time when it was of extraordinary importance that the value the federal government places upon constitutional rights be very clear. Today's questions may be more difficult, and it may be time to pay more attention to the strength of state and local governments. But Justice Douglas's commitment still makes sense. We can live with it — if we are careful in our chartings of constitutional scope and defendant responsibility.

300. *See* Paul v. Davis, 424 U.S. 693, 707-10 (1976).

301. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980); Baker v. McCollan, 443 U.S. 137 (1979); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969).